Missouri Attorney General's Opinions - 1989

Opinion	Date	Topic	Summary
13-89	Feb 23		Opinion letter to Dennis W. Smithmier
16-89	Aug 4		Opinion letter to The Honorable Roy D. Blunt and The Honorable Margaret Kelly, CPA
26-89			Withdrawn
27-89	Feb 23	DEEDS OF TRUST. LOANS. MORTGAGED PROPERTY. REAL ESTATE MORTGAGES. USURY.	Section 408.052, RSMo 1986, does not prohibit "late charges" on residential real estate loans when loan payments are untimely made.
28-89	Oct 11	AUDITS. HOUSING AUTHORITY. MUNICIPAL HOUSING AUTHORITY.	A municipal housing authority, established under Chapter 99, RSMO, which does not own or maintain property or projects as defined in Chapter 99, RSMo, is subject to the requirements of Section 99.055, RSMo Supp. 1988, that the board of commissioners conduct an annual audit and hold public hearings.
30-89	Jan 30	AID TO RELIGION. CONSTITUTIONAL LAW. COUNTIES. COUNTY HEALTH CENTER. PAROCHIAL SCHOOLS. PRIVATE SCHOOLS. SCHOOLS.	1. The Establishment Clause of the First Amendment of the United States Constitution, as applicable to this state through the Fourteenth Amendment, prohibits county health centers from providing speech therapy services and certain public health lectures to the students of sectarian schools on the premises of those schools during normal school hours. 2. Neither the Establishment Clause of the First Amendment of the United States Constitution, nor Article I, Sections 6 and 7, nor Article IX, Section 8, of the Missouri Constitution prohibit county health centers from providing diagnostic and screening health services to the students of sectarian schools, whether or not on the grounds of those schools.
33-89	Apr 14	FIRE PROTECTION DISTRICTS. HEALTH INSURANCE. INSURANCE.	Directors of a fire protection district are eligible for health insurance benefits from the fire protection district pursuant to the provisions of Section 67.150, RSMo 1986.
36-89	Sept 6	ECONOMIC DEVELOPMENT, DEPARTMENT OF. EDUCATIONAL	The phrase "duly chartered educational institution" as used in Section 345.025.1(1), RSMo 1986, does not include preschool entities, day care centers and rehabilitation centers which are primarily custodial but include educational or instructional terms in their charters, and

		INSTITUTIONS. HEALING ARTS, BOARD OF. PROFESSIONAL REGISTRATION, DIVISION OF.	the phrase "in the employ of" as used in Section 345.025.1(1) does not include independent contractors.
39-89	Jan 6		Opinion letter to Robert B. Paden
44-89	July 21	COUNTIES. COUNTY COLLECTORS. DRAINAGE DISTRICT.	A county collector in a third class, nontownship county collecting taxes pursuant to Section 242.540, RSMo 1986, for drainage districts organized in circuit court must collect on behalf of the county the fees provided for in Section 52.275, RSMo Supp.1988, and deposit these fees into the county general revenue fund, unless the collector and the county have contracted to allow the collector to retain these fees, or a part of them, pursuant to subsection 3 of Section 52.269, RSMo Supp. 1988.
46-89	Apr 4	SCHOOLS. TEACHERS CERTIFICATES. TEACHERS TENURE. VOCATIONAL EDUCATION. VOCATIONAL TRAINING.	Instructors who are employed by a local school district to instruct in programs funded pursuant to the Job Training Partnership Act, 29 U.S.C. Section 1501 et seq., are "teachers" as that term is defined in Section 168.104(7), RSMo 1986, of the Missouri Teacher Tenure Act.
51-89	Mar 10	CITIES, TOWNS AND VILLAGES. CITY ATTORNEY. FOURTH CLASS CITIES. SPECIAL COUNSEL.	Pursuant to Section 79.230, RSMo 1986, the board of aldermen of a fourth class city may not employ special counsel without approval of the mayor.
54-89			Withdrawn
57-89	Jan 30	AIRPORTS. CONDEMNATION. EMINENT DOMAIN.	Land separated from an existing airport by a public road or highway and located in the same county as the county which created the airport authority is "adjacent to the existing airport" as that phrase is used in Section 305.307.2, RSMo 1986.
59-89	Apr 4	INVESTMENTS. PUBLIC SCHOOL RETIREMENT SYSTEM.	The Public School Retirement System of Missouri is authorized by Section 169.040.2(9), RSMo 1986, to engage in an investment procedure known as "securities lending.
61-89	Mar 22	COUNTIES. COUNTY SALES TAX. TAXATION-COUNTY SALES TAX.	Harrison County can increase the sales tax authorized by Section 67.547, RSMo Supp. 1988, from one-fourth of one percent to one-half of one percent if authorized by a majority vote of the governing body and approved by the majority of the voters casting a vote on

			the proposal when submitted at a county or state general, primary or special election.
62-89	Apr 5	COUNTIES. COUNTY INSURANCE. COUNTY OFFICIALS. COUNTY SURVEYOR. HEALTH INSURANCE. INSURANCE.	A county which provides health insurance to some of its elected officials is not required to provide health insurance to the county surveyor.
64-89	Mar 3		Opinion letter to The Honorable Raymond W. "Bill" Hand
68-89	Aug 1		Opinion letter to The Honorable Ted House
71-89	Mar 3		Opinion letter to The Honorable Joe McCracken and The Honorable Ken Legan
73-89	Mar 27	ASSESSOR. COUNTIES. COUNTY EMPLOYEES. NEPOTISM.	(1) A county assessor who retains as an employee a relative within the fourth degree, by consanguinity or affinity, which relative was employed by the prior county assessor, does not violate Article VII, Section 6 of the Missouri Constitution, the nepotism provision, and (2) pay increases or increases in other benefits incidental to the original employment do not result in the county assessor violating the nepotism provision.
74-89	Mar 3	CHAMBER OF COMMERCE. CONSTITUTIONAL LAW. COUNTIES. COUNTY FUNDS. GRANT OF PUBLIC MONIES.	A third-class county is not authorized to grant money without restriction to a private entity such as a chamber of commerce.
76-89	Sept 26	DEPARTMENT OF PUBLIC SAFETY. PEACE OFFICERS. POLICE. POLICE TRAINING.	(1) The "grandfather" provisions in Section 590.115, RSMo Supp. 1988, exempt certain peace officers and reserve officers from being certified, and the director of the Department of Public Safety may not issue a certificate to such officers unless the officers have completed the required training, (2) the director may establish training requirements for reserve officers who are exempt from certification, but voluntarily choose to seek certification, (3) under subsection 2 of Section 590.115 only peace officers who were working as a peace officer prior to December 31, 1978, and were working for the same department after August 15, 1988, as they were working for on August 13, 1988, are exempt from certification, and (4) reserve officers appointed after August 15, 1988, must receive the same training as peace officers in order to be certified.

79-89	Mar 20		Opinion letter to Charles E. Kruse
84-89	Sept 14	ASSESSORS. CONFLICT OF INTEREST.	It would be a conflict of interest, as a matter of public policy, for a county assessor to appraise property in his individual capacity as a private appraiser within the county for which he serves as county assessor.
88-89	July 21	CHIROPRACTICS-CHIROPRACTORS. INSURANCE. MEDICAL CARE PLAN. SELF-INSURER.	Section 375.936(11)(b), RSMo 1986, is not applicable to self insured governmental medical care plans.
89-89	June 12	LABOR AND INDUSTRIAL RELATIONS, DEPARTMENT OF. PREVAILING WAGE LAW. SUNSHINE LAW.	If a public governmental body retains copies of records of the information set out in Section 290.290, RSMo 1986, they are public records as defined in Section 610.010(4), RSMo Supp. 1988, and must be made available for inspection and copying pursuant to Section 610.023, RSMo Supp. 1988.
94-89	Dec 11		Opinion letter to John B. Berkemeyer
100-89	Oct 27	PEACE OFFICERS. POLICE. POLICE TRAINING. SHERIFFS.	The curriculum for the training program for newly-elected sheriffs required by Sections 590.170 and 590.175, RSMo, need not be identical to the curriculum for the training program for peace officers required by Sections 590.100 to 590.150, RSMo, and newly-elected sheriffs must complete the required training by the end of the six-month period after their election as sheriff.
102-89	May 12	BOUNDARIES. CHARTER CITIES. CITIES, TOWNS AND VILLAGES. CONSTITUTIONAL CHARTER CITIES.	A constitutional charter city has the power to alter its boundaries so as to exclude territory from its corporate limits and such city is empowered to develop its own procedures to accomplish this.
104-89	Apr 17	INCOME TAX. INTERGOVERNMENTAL TAX IMMUNITY. TAXATION-GENERAL. TAXATION-INCOME TAX. TAX REFUNDS.	(1) Based on the principles stated in Paul S. Davis v. Michigan Department of Treasury, No. 87-1020 (U.S. March 28, 1989), taxation of retirement benefits of federal civil service and military retirees under current Missouri income tax statutes is invalid, and (2) the State of Missouri must recognize timely income tax refund claims filed by federal civil service and military pensioners.
106-89	Dec 28		Opinion letter to The Honorable Margaret Kelly, CPA
107-89	Nov 2	COUNTIES.	Training funds collected under Section 590.140, RSMo Supp. 1988,

		COUNTY FUNDS. PEACE OFFICERS. POLICE. POLICE TRAINING. SHERIFFS.	cannot be used to pay a private business to develop personnel and jail administration policies but can be used to train department personnel on such policies.
113-89	July 14	BOARD OF CURATORS OF LINCOLN UNIVERSITY. LINCOLN UNIVERSITY.	1. Section 175.020, RSMo 1986, requires that one of the nine members of the board of curators of Lincoln University be a full-time student at Lincoln University and this "student curator" is vested with the same powers, duties and responsibilities as are the other eight members of the board of curators. 2. The "student curator", pursuant to Sections 175.020 and 175.030, RSMo 1986, receives from the ordinary revenues of the university his actual expenses for attending the meetings of the board of curators; however, the "student representative" under Section 175.021, RSMo 1986, is prohibited by subsection 6 of that section from receiving expenses. 3. The "student curator" is prohibited from entering into employment as a research assistant or departmental tutor in one of the academic departments at Lincoln University; however, there is no such prohibition in regard to the "student representative" entering into such employment. 4. The board of curators at Lincoln University consists of nine members, and no more; one of those members being the "student curator" provided for in Section 175.020, RSMo 1986.
117-89			Withdrawn
123-89	Sept 6	CITIES, TOWNS AND VILLAGES. CITY OFFICERS-OFFICIALS. THIRD CLASS CITIES. VACANCY. VACANCY IN OFFICE.	The sentence in Section 77.450, RSMo 1986, providing "[t]he council shall approve the person recommended by the mayor" grants the council discretion to approve or disapprove the person recommended.
128-89	Dec 11	COUNTIES. COUNTY OFFICERS. COUNTY OFFICIALS. COMPENSATION. SHERIFFS.	A sheriff of a third class county is not entitled to receive the $1,000.00 provided by Section 57.403, RSMo 1986, in addition to his current salary.
134-89	July 20		Opinion letter to The Honorable Roy D. Blunt
135-89	July 21		Opinion letter to The Honorable Roy D. Blunt
136-89	July 26		Opinion letter to The Honorable Anthony D. Ribaudo
138-89	Aug 2		Opinion letter to The Honorable Roy D. Blunt

139-89	Aug 3		Opinion letter to The Honorable Roy D. Blunt
140-89	Aug 3		Opinion letter to The Honorable Roy D. Blunt
142-89	Nov 13	COORDINATING BOARD OF HIGHER EDUCATION. SCHOLARSHIPS. STUDENT FINANCIAL ASSISTANCE PROGRAM. UNIVERSITIES.	Medical students enrolled in the six-year program at the University of Missouri at Kansas City are eligible for benefits under the Higher Education Academic Scholarship Program authorized by Sections 173.250 to 173.252, RSMo Supp. 1988, until they become graduate or professional students. Six-year medical students become graduate or professional students after completing three years of the program unless, by participating in a federal Title IV financial aid program as undergraduate students, they retain their undergraduate status for a fourth year.
148-89	Aug 17		Opinion letter to The Honorable Roy D. Blunt
149-89	Aug 23		Opinion letter to The Honorable Roy D. Blunt
170-89	Dec 28		Opinion letter to The Honorable Norman E. Sheldon
175-89	Dec 5		Opinion letter to The Honorable Joseph Ortwerth
184-89	Nov 28	CITIES, TOWNS AND VILLAGES. SUNSHINE LAW.	Section 610.021(3), RSMo Supp. 1988, does not authorize the governing body of a city to close a meeting when considering appointments of volunteers to citizen boards.
186-89	Dec 21		Opinion letter to The Honorable Joe McCracken
199-89	Dec 28		Opinion letter to Dr. Robert E. Bartman

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

February 23, 1989

OPINION LETTER NO. 13-89

FILED
13

Dennis W. Smithmier
Caldwell County Prosecuting Attorney
Caldwell County Courthouse
Kingston, Missouri 64650

Dear Mr. Smithmier:

This opinion letter is in response to a question submitted by your predecessor asking:

> Is an ex-officio county recorder of deeds required by law to record unnotarized documents purporting to cancel a marriage license?

The powers and duties of an ex-officio county recorder of deeds are largely ministerial. See Attorney General Opinion No. 54, Long, November 28, 1938, a copy of which is enclosed. The recording of deeds and other instruments affecting the title to land is purely a system of legal institution, and not of common right or abstract justice. See Attorney General Opinion No. 83, Smith, April 21, 1939, a copy of which is enclosed.

In view of the foregoing, the power and duty of the recorder of deeds to record a document extends only to those documents of the type and in the form specifically prescribed by law. There is no provision within the Missouri statutes specifically providing for the recordation of a document purporting to cancel a marriage license. Thus, unless such a document can be determined to fall within some other statutory provision concerning the recording of a class of documents, the county recorder of deeds may not accept such a document for recording. Statutes to be considered include:

Section 59.330, RSMo 1986, which provides:

> 59.330. What shall be recorded.--It shall be the duty of recorders to record:

> (1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; . . .
>
> (2) All papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government;
>
> (3) All marriage contracts and certificates of marriage;
>
> (4) All commissions and official bonds required by law to be recorded in their offices;
>
> (5) All written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father and maiden name of the mother of such child or children.

Section 451.150, RSMo Supp. 1988, which provides:

> 451.150. Licenses to be recorded--fee.--The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of ten dollars to be paid for by the person obtaining the same.

Section 442.380, RSMo 1986, which provides:

> 442.380. Instruments to be recorded.--Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the

recorder of the county in which such real estate is situated.

In Attorney General Opinion No. 44, Blackwell, March 6, 1964, a copy of which is enclosed, it was decided that death certificates are eligible for recordation under Section 59.330(1). The reasoning of that opinion, however, is not applicable to the document about which you are concerned.

Because of the absence of a statutory provision providing for the recording of a document such as that about which you are concerned, it is the opinion of this office that the ex-officio recorder of deeds is not required to record the document.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosures:
Opinion No. 54, Long, November 28, 1938
Opinion No. 83, Smith, April 21, 1939
Opinion No. 44, Blackwell, March 6, 1964

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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August 4, 1989

OPINION LETTER NO. 16-89

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building, Room 210
Jefferson City, Missouri 65101

and

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building, Room 224
Jefferson City, Missouri 65101

Dear Mr. Blunt and Mrs. Kelly:

This opinion letter is in response to your question asking:

> Does the Commissioner of Securities have authority to receive a monetary settlement in an administrative licensing case when the funds received are deposited in the state's General Revenue Special Funds Account and subsequently appropriated by the General Assembly for the purpose for which they were received?

You provided the following statement of facts relating to the question posed:

> The Missouri Commissioner of Securities settled an administrative licensing matter with a brokerage firm by agreeing to accept $50,000.00 for the purpose of investor education activities. The brokerage firm wished to settle this matter before a civil proceeding was instituted before the Administrative Hearing Commission. The matter was settled and the Commissioner of Securities entered an order pursuant to section 409.408(b) RSMo 1986. . . . The

> money received was deposited in Missouri's General Revenue Special Funds Account (pursuant to section 33.563 and 33.571 RSMo 1986). Subsequently the General Assembly appropriated portions of the money for use in investor education programs by the Secretary of State. The State Auditor has questioned the acceptance of this money as a violation of Article IX, Section 7 of the Missouri Constitution and Section 166.131 RSMo 1986.

The brokerage firm to which you refer is E. F. Hutton & Company, Inc. The settlement occurred in January, 1986.

The Commissioner of Securities is the public officer charged with administering and enforcing, under direction of the Secretary of State, the goals of Missouri's securities laws. See Chapter 409, RSMo 1986. Like other public officers, the Commissioner of Securities has only those powers expressly or impliedly conferred by law. See Curdt v. Missouri Clean Water Commission, 586 S.W.2d 58, 60 (Mo.App., E.D. 1979); Scheble v. Missouri Clean Water Commission, 734 S.W.2d 541, 556 (Mo.App., E.D. 1987). In January, 1986, at the time of the settlement about which you are concerned, no statute authorized the Commissioner of Securities to settle the matter in the manner descibed in your statement of facts. Therefore, it is the opinion of this office that the Commissioner of Securities had no authority in January, 1986, to enter into the settlement described in your statement of facts.

Subsequent to the settlement described in your statement of facts, subsection (f) of Section 409.407, RSMo 1986, was enacted in 1986 in House Bill No. 1447, 83rd General Assembly, Second Regular Session (1986). Such subsection provides:

> **409.407. Investigations and subpoenas--violations in other states.--**
>
> * * *
>
> (f) As settlement of an investigation the commissioner may receive a fine from any party, as well as voluntary payment for the cost of the investigation.
>
> * * *

The Honorable Roy D. Blunt
The Honorable Margaret Kelly, CPA

Pursuant to subsection (f) of Section 409.407, the Commissioner of Securities may now receive a fine from any party, as well as voluntary payment for the cost of the investigation.

You also inquire about the effect of Article IX, Section 7 of the Missouri Constitution on the deposit of any money received in settlement. Article IX, Section 7 of the Missouri Constitution provides:

> Section 7. County and township school funds--liquidation and reinvestment--optional distribution on liquidation--annual distribution of income and receipts. . . . the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, . . . shall be distributed annually to the schools of the several counties according to law.

Licensing statutes are not penal laws. See New Franklin School Dist. No. 28, Howard County v. Bates, 225 S.W.2d 769 (Mo. 1950). The purpose of statutes authorizing revocation of a license is protection of the public, not punishment of the offender. See Younge v. State Board of Registration for Healing Arts, 451 S.W.2d 346, 349 (Mo. 1969), cert. denied, 397 U.S. 922, 90 S.Ct. 910, 25 L.Ed.2d 102 (1970), reh. denied, 397 U.S. 1018, 90 S.Ct. 1231, 25 L.Ed.2d 433 (1970); In re Sympson, 322 S.W.2d 808, 812 (Mo. banc 1959); Wasem v. Missouri Dental Board, 405 S.W.2d 492, 497 (Mo.App., St.L. 1966). Because money received in settlement is not received "for any breach of the penal laws of the state," Article IX, Section 7 of the Missouri Constitution does not apply to the deposit of the money in question.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

DEEDS OF TRUST:
LOANS:
MORTGAGED PROPERTY:
REAL ESTATE MORTGAGES:
USURY:

Section 408.052, RSMo 1986, does not prohibit "late charges" on residential real estate loans when loan payments are untimely made.

February 23, 1989

OPINION NO. 27-89

FILED
27

Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building, 6th Floor
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question asking:

> Does Section 408.052, RSMo, prohibit late charges on loans secured by first mortgages (deeds of trust, etc.) on residential real estate?

Section 408.052, RSMo 1986, provides:

> 408.052. Points prohibited, exception -- penalty for illegal points -- violation a misdemeanor--1. No lender shall charge, require or receive, on any residential real estate loan, any points or other fees of any nature whatsoever, excepting insurance and a one percent origination fee, whether from the buyer or the seller or any other person, except that the lender may charge bona fide expenses paid by the lender to any other person or entity except to an officer, employee, or director of the lender or to any business in which any officer, employee or director of the lender owns any substantial interest for services actually performed in connection with a loan. In addition to the foregoing, if the loan is for the construction, repair, or improvement of residential real estate, the lender may charge a fee not to exceed one percent of the loan amount for inspection and disbursement of the proceeds of the loan to

> third parties. The restrictions of this section shall not apply (1) to any loan which is insured or covered by guarantee made by any department, board, bureau, commission, agency or establishment of the United States, pursuant to the authority of any act of Congress heretofore or hereafter adopted; and (2) to any loan for which an offer or commitment or agreement to purchase has been received from and which is made with the intention of reselling such loan to the Federal Housing Administration, Farmers Home Administration, Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation, or to any successor thereof, to any other state or federal governmental or quasi-governmental organization. Any points or fees received in excess of those permitted under this section shall be returned to the person from whom received upon demand.
>
> 2. If any points or fees are charged, required or received, which are in excess of those permitted by this section, or which are not returned upon demand when required by this section, then the person paying the same or his legal representative may recover twice the amount thus paid together with costs of the suit and reasonable attorney's fees, provided that the action is brought within five years of such payment.
>
> 3. Any lender who knowingly violates the provisions of this section is guilty of a class B misdemeanor. [Emphasis supplied.]

Ascertainment of legislative intent is the primary goal of statutory construction. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219, 224 (Mo. banc 1986). When general words follow a specific enumeration of a person or a thing, the general words should be limited to persons or things similar to those specifically enumerated. Pollard v. Board of Police Commissioners, 665 S.W.2d 333, 341 (Mo. banc 1984), cert. denied 473 U.S. 907, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985). Under this rule of

statutory construction, the phrase "or other fees of any nature whatsoever," is limited to fees similar to "points."

In B. F. Saul Company v. West End Park North, Inc., 246 A.2d 591 (Md. 1968), the Maryland Court of Appeals defined the term "point" as follows:

> [1] Our search reveals that there is no mysterious connotation to the word "point." It simply denotes a fee or charge equal to one per cent (1%) of the principal amount of the loan which is collected by the lender at the time the loan is made. It may be used interchangeably with the term "bonus," "premium," "loan origination fee" or "service charge." The basic tenent to remember is that it is a fee or charge which is collected only once, at the inception of the loan, and is in addition to the constant long term stated interest rate on the face of the loan. [Emphasis supplied.]

Id., 246 A.2d at 595.

The Court in B. F. Saul Company, supra, in addition to defining the term "point," discussed the effect of the giving of "points," with the thought that it was for the recoupment of the operating costs attendant to negotiating the loan. The Court concluded in regard to the usage of "points":

> [2] The 6.65% annual yield to maturity set forth in the above example is the annual effective rate of interest and is not usurious. Adopting the validity of the above illustration this Court concludes that the charge of a fee, commonly called "points" made at the inception of the loan, should not be considered interest paid in the initial year of the loan but is to be computed or spread over the term of the loan.
>
> [3] Although the Act manifests legislative hostility to the charging of points, as may be deduced from § 2(A), yet the language of § 2(B) expresses an expectation of the usage of points with regard to the FHA, VA and other federally insured or guaranteed

> loans. We do not think it was intent of the Legislature that Maryland should be different from other jurisdictions, where such charges made at the inception of the loan, are not construed as usurious when the amount obtained plus the interest actually charged spread over the life of the loan is less than the legal maximum interest. 57 A.L.R.2d 649 Anno: Usury-Interest In Advance § 6. We think that the Legislature, although eliminating "points" with regard to conventional home mortgage loans, (§ 2(A)), did not intend to eliminate them with regard to FHA and VA loans, or other loans guaranteed by an instrumentality of the federal government where the maximum interest rate was not more than seven per cent (7%), but rather to regulate them. (§ 2(B)). [Emphasis supplied.]

Id., 246 A.2d at 597.

A late charge represents compensation to the lender for failure of the borrower to make timely payment. In State ex rel. Ashcroft v. Public Service Commission, 674 S.W.2d 660, 663 (Mo. App. 1984), the Missouri Court of Appeals concluded that late charges allowed electric utilities by the Public Service Commission for governmental accounts were not an interest penalty subject to usury legislation. Late charges are not similar to "points" and are therefore not prohibited by Section 408.052.

CONCLUSION

Section 408.052, RSMo 1986, does not prohibit "late charges" on residential real estate loans when loan payments are untimely made.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

AUDITS:
HOUSING AUTHORITY:
MUNICIPAL HOUSING AUTHORITY: A municipal housing authority, established under Chapter 99, RSMo, which does not own or maintain property or projects as defined in Chapter 99, RSMo, is subject to the requirements of Section 99.055, RSMo Supp. 1988, that the board of commissioners conduct an annual audit and hold public hearings.

October 11, 1989

OPINION NO. 28-89

The Honorable Harold Caskey
Senator, District 31
State Capitol Building, Room 320
Jefferson City, Missouri 65101

Dear Senator Caskey:

This opinion is in response to your question asking:

> If a municipal housing authority, as established under chapter 99, RSMo, does not own or maintain "property" or "projects" as defined in chapter 99, RSMo, is that housing authority subject to the requirements of section 99.055, RSMo, - specifically, requirements that the board conduct an annual audit and hold public hearings?

In the statement of facts you submitted with your opinion request, you state: "Many municipal housing authorities do not own or operate property, they merely administer section 8 HUD programs using existing privately owned housing stock."

Section 99.055, RSMo Supp. 1988, provides:

> 99.055. Annual audit, content--annual hearings.--The board of commissioners of each housing authority shall conduct an annual audit of all operations and activities undertaken by said housing authority pursuant to this chapter, including, but not limited to, reports of revenues and expenditures of said housing authority and such related entities as

> described in subsection 3 of section 99.080, divided and broken out by each project or undertaking as defined in paragraph (b) of subdivision (12) of section 99.020. The board of commissioners shall issue a detailed report of said audit and shall make said report available to the public upon its completion. In connection therewith and after the final issuance of such audit, each board of commissioners shall conduct not less than one public hearing and, with respect to authorities which own and operate one thousand or more rental units prior to the final issuance of such audit as part of audit procedure not less than two hearings and after the final issuance of such audit not less than one hearing, at locations reasonably accessible to tenants of housing project, for the purposes of obtaining tenant and public responses regarding the activities of the authority during the preceding year and suggestions for future activities of the authority. (Emphasis added.)

Housing authorities have broad authority to carry out activities in addition to the acquisition or maintenance of "property" or a "project." The powers set forth in Chapter 99, RSMo, indicate that a housing authority may be involved in many operations and activities which do not involve the ownership or maintenance of property or projects.

Pursuant to rules of statutory construction, language should be given its plain and ordinary meaning if it is not ambiguous. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo.banc 1986); State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo.banc 1984). Section 99.055, RSMo Supp. 1988, provides, in part, that "[t]he board of commissioners of each housing authority shall conduct an annual audit of all operations and activities undertaken by said housing authority pursuant to this chapter. . . ." The use of the word "shall" indicates that this section is mandatory. State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W.2d 290, 296 (Mo. 1975); Citizens For Rural Preservation, Inc. v. Robinett, 648 S.W.2d 117, 132 (Mo. App. 1982). Thus, the plain meaning of the statutory section indicates that the section applies to all operations and activities of the housing authority, not just those operations or activities

involving the ownership or maintenance of property or projects.

With respect to the hearings required by Section 99.055, RSMo Supp. 1988, the statute likewise uses the word "shall." Because the legislature again used the word "shall," it is mandatory for the board of commissioners to hold the public hearings specified in the statute.

The fact that a housing authority does not own or maintain "property" or "projects" does not mean that the housing authority does not have activities and operations that are required to be audited and subjected to public scrutiny and comment at a public hearing.

CONCLUSION

It is the opinion of this office that a municipal housing authority, established under Chapter 99, RSMo, which does not own or maintain property or projects as defined in Chapter 99, RSMo, is subject to the requirements of Section 99.055, RSMo Supp. 1988, that the board of commissioners conduct an annual audit and hold public hearings.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

AID TO RELIGION:
CONSTITUTIONAL LAW:
COUNTIES:
COUNTY HEALTH CENTER:
PAROCHIAL SCHOOLS:
PRIVATE SCHOOLS:
SCHOOLS:

1. The Establishment Clause of the First Amendment of the United States Constitution, as applicable to this state through the Fourteenth Amendment, prohibits county health centers from providing speech therapy services and certain public health lectures to the students of sectarian schools on the premises of those schools during normal school hours. 2. Neither the Establishment Clause of the First Amendment of the United States Constitution, nor Article I, Sections 6 and 7, nor Article IX, Section 8, of the Missouri Constitution prohibit county health centers from providing diagnostic and screening health services to the students of sectarian schools, whether or not on the grounds of those schools.

January 30, 1989

OPINION NO. 30-89

FILED
30

The Honorable Edward Quick
Senator, District 17
State Capitol Building, Room 421
Jefferson City, Missouri 65101

and

Michael E. Reardon
Clay County Prosecuting Attorney
Clay County Courthouse
11 South Water
Liberty, Missouri 64068

Dear Senator Quick and Mr. Reardon:

Each of you has asked for an opinion from this office on certain questions pertaining to the operations of the Clay County Health Center. Because of the similarity of the questions posed, we have combined your requests into one opinion. Senator Quick's questions are as follows:

> a. Does the Missouri Constitution prohibit a tax-supported county health unit from providing speech therapy services to parochial school students, on parochial school grounds, during normal school hours?
>
> b. Does the Missouri Constitution prohibit a tax-supported county health unit

from providing any health services to parochial school students, whether or not on parochial school grounds?

c. Are constitutional provisions limiting the ability of public school districts to serve parochial school students applied in a similar way to county health units?

Mr. Reardon's questions are as follows:

I. Does Article IX, Section 8, of the Missouri Constitution prohibit the use of "public funds" in providing speech services to parochial school students, at the parochial school?

II. If Article IX, Section 8, of the Missouri Constitution does prohibit the use of "public funds" in providing aid to parochial schools, does this also include all public health services that are offered to the parochial schools?

FACTUAL BACKGROUND

The purpose of a county health center is "for the improvement of health of all inhabitants" of the county. Section 205.050, RSMo 1986. County health centers are established and maintained pursuant to the provisions of Sections 205.010 to 205.150, RSMo. Upon receipt of a petition signed by the prescribed number of voters of the county, the county commission submits to a popular vote the question of whether an annual tax on property in the county should be levied for the establishment and operation of the county health center and its personnel. Section 205.010, RSMo 1986. The county health center is governed by a five-member board of health center trustees elected by popular vote. Sections 205.031, 205.041 and 205.042, RSMo 1986. They have exclusive control over the expenditure of all monies credited to the county health center fund. Section 205.042.3, RSMo 1986. The board of health center trustees appoints the personnel for the health center, Section 205.042.4, RSMo 1986, with the director serving also as the county health officer. Section 205.100, RSMo 1986.

We have been provided the following information regarding the Clay County Health Center. The Clay County Health Center renders a variety of health services to children. These

services are available to those children who attend public, private non-sectarian and private sectarian schools. All, except one, of the public school districts in the county provide some of these services to their own students through school nurses employed by the school district. The county health center provides these services to the students of the school district which does not provide them on its own.

The services provided by the county health center can be divided into diagnostic, therapeutic and teaching. All are provided by employees or contractors of the county health center. Diagnostic services include dental, vision and scoliosis screenings done on the premises of the school during regular school hours.

Therapeutic services include speech therapy and dental treatment. The speech therapy is provided on school premises during school hours. Those children who are indicated for further dental treatment after the dental screening take a card home to their parents informing them that, if the child is eligible for the free or reduced school lunch program, he can receive free dental treatment at the county health center facilities during regular business hours.

The teaching services consist of lectures given by such people as the county health center dental hygienist, nutritionist or health educator to children on school premises during school hours in a classroom setting. These are presentations on topics of general health and safety and are normally completed in one session. They are given upon the request of the school.

LEGAL DISCUSSION

1. PUBLIC HEALTH SERVICES

The following provisions of the Missouri Constitution are those most directly implicated:

> Article I, Section 6, Missouri Constitution:
>
> "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such

> object, he shall be held to the performance of the same."
>
> Article I, Section 7, Missouri Constitution:
>
> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."
>
> Article IX, Section 8, Missouri Constitution:
>
> "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

In a decision regarding the constitutionality of certain provisions of Sections 170.051 and 170.055, RSMo 1969, which provided for the lending of textbooks purchased with public funds to pupils and teachers in nonpublic schools, the Missouri Supreme Court made the following observation:

> "From all of which, it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." Paster v. Tussey, 512 S.W.2d 97, 101-102 (Mo. banc 1974), cert.

> denied sub nom. Reynolds v. Paster, 419 U.S. 1111 (1975).

The court went on to hold that the contested provisions of those statutes violated both Article I, Section 6 and Article IX, Section 8 of the Missouri Constitution on the basis that to give assistance to a student attending a sectarian school which would aid that student in the objective of obtaining a sectarian education serves to give unconstitutional aid to a sectarian purpose. Id. at 104-105.

Sections 205.010 to 205.150, RSMo, establishing county health centers were passed in furtherance of the health and welfare of the public and, as such, represent an exercise of the police power of the state. However, the police power, as with any other governmental power, must always be exercised within the constraints of constitutional authority. DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146, 148 (banc 1940), and State ex rel. Preisler v. Woodward, 340 Mo. 906, 105 S.W.2d 912, 915 (1937).

There has been no reported case in which any court has addressed the question as to what extent Article I, Sections 6 and 7 and Article IX, Section 8 of the Missouri Constitution limit the state and local government's police powers in regard to providing health and welfare services to children attending sectarian schools. Other jurisdictions, interpreting their respective state constitutional restrictions, have recognized that such provisions do not impose a blanket prohibition on providing health and welfare services to those children.

In Spears v. Honda, 449 P.2d 130 (Hawaii 1968), the Hawaii Supreme Court ruled that a statute providing public funds for bus transportation subsidies to sectarian and other private schools ran afoul of Article IX, Section 1, of the Hawaii Constitution providing that no public funds shall be "appropriated for the support or benefit of any sectarian or private educational institution." The court interpreted this provision as prohibiting indirect as well as direct benefits. Id. at 137. However, the court cited the report of the committee in the constitutional convention which drafted that particular constitutional provision as expressly not intending to "prohibit the present practice of the use of public money for dental and public health services in private schools in the Territory." Id. at 135. The court went on to hold:

> "While the framers specifically excepted the existing practice of the use of public money for dental and public health services in

> private schools from the prohibition, the funds appropriated for such services were viewed not as a benefit to children but as funds to be used by the State to exercise 'nominal supervisory control' over nonpublic schools 'in the interests of the public health.' The services were aimed at assuring that the nonpublic schools, as centers of learning, were as safe to attend as the public schools. Appellees admit that, even today, the children are inspected at the school itself during school hours." Id. at 135-136.

In Dickman v. School District No. 62C, Oregon City, of Clackamas County, 366 P.2d 533 (Ore. banc 1961), cert. denied sub nom. Carlson v. Dickman, 371 U.S. 823 (1962), the Oregon Supreme Court declared a free textbook statute violative of Article I, Section 5, of the Oregon Constitution:

> "No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

The court held that this provision expressed the policy of the First Amendment of the United States Constitution as explained in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946). It did not regard "as significant the fact that our constitution does not contain the phrase 'directly or indirectly' as some constitutions do." Id. at 543, fn. 31. The court held that the free textbook statute was unconstitutional for the same reasons as the Missouri Supreme Court did in Paster v. Tussey, supra. Even though it rejected the authority of the police power of the state as the basis on which the free textbook statute could be upheld, the court still recognized the validity of providing health and welfare services to parochial school students:

> "Neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization. The proscription is against aid to religious functions. The benefits of police and fire protection, sewage disposal,

and other community financed services accrue to churches, not as religious organizations but as owners of property in the community. And, the same principle applies when public expenditures benefit individuals who are engaged in carrying out a religious function. A government pension paid to a clergyman for his services in the Armed Forces may benefit religion but it is not constitutionally prohibited; in such case he receives the bounty not as a cleric but as any other citizen. On the other hand, the state obviously could not pay the clergyman's salary. The point is clearly seen by Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill.L. Rev. 333, 348 (1950):

> 'The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way in which the aid is extended. Aid is not normally extended to individuals or institutions by name, but rather to groups or classes of individuals or institutions. Any individual or institution falling under the restrictions of the law, or falling heir to its benefits, does so only as a member of such a group. An individual may be a pupil, a pedestrian, a property owner and a parent. A church is at once a corporation, a piece of property, a building, a meeting place, a religious institution and a nonprofit institution. Furthermore, a church may receive police protection when classed as property, tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid. Since the aid goes to groups rather than the individual components of any one group, the eligibility of an institution to receive public aid would seem to depend

> on which group it is classed in, rather than on its individual characteristics.'
>
> The author then correctly concludes that where the aid is to pupils and schools the benefit is identified with the function of education and if the educational institution is religious, the benefit accrues to religious institutions in their function as religious institutions. And so it is in the case at bar. Granting that pupils and not schools are intended to be the beneficiaries of the state's bounty, the aid [free textbooks] is extended to the pupil only as a member of the school which he attends. Whoever else may share in its benefits such aid is an asset to the schools themselves. State ex rel. Traub v. Brown, 36 Del. 181, 172 A. 835 (1934)." Id. 542-543.

We, therefore, conclude that Article I, Sections 6 and 7 and Article IX, Section 8 of the Missouri Constitution do not contain a complete prohibition on public funds being used to provide health and welfare services to children who attend sectarian schools. Considering the second of each of your questions first, the county health center makes the diagnostic services referred to in those questions available to public and private schools, including both sectarian and non-sectarian private schools. It is clear that the class or group targeted is not described by the school attended but by the age of the person. It makes sense that, when targeting a particular population group for general health and welfare services, health center personnel would go to the place where members of that group are in the greatest abundance. In this case, school age children being the intended recipient of the services, the health center personnel go to schools during the school day. Simply because the children happen to be in a sectarian school does not mean that the health center is prohibited from providing them certain types of services at that school. Therefore, we conclude that providing the diagnostic health services to students in sectarian schools during the regular school day and on that school's premises does not violate Article I, Sections 6 and 7 nor Article IX, Section 8 of the Missouri Constitution. The same conclusion applies to providing dental treatment to eligible students of all schools, including those from sectarian schools, which treatment is provided at the health center facilities and not on school grounds.

2. SPEECH THERAPY AND TEACHING

In regard to rendering speech therapy services and teaching public health classes to sectarian school students during the regular school day at a sectarian school, there is no need to analyze the legality of these activities under the state constitutional provisions cited above because they are prohibited by the Establishment Clause of the First Amendment to the United States Constitution which is applicable to the states through the Fourteenth Amendment. Meek v. Pittenger, 421 U.S. 349, 351, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975):

> "Congress shall make no law respecting an establishment of religion, . . ." U.S. Const., Amend. I.

The First Amendment issues regarding the types of services with which we are concerned here were resolved in Meek v. Pittenger, supra, and Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). In Meek, the court addressed the constitutionality of Acts 194 and 195, Pa.Stat.Ann., Tit. 24, Section 9-972, enacted by the Commonwealth of Pennsylvania. Act 194 provided for certain "auxiliary services" to be rendered through the expenditures of public funds. These auxiliary services included:

> "guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

The Act also provided that these services would be rendered on the premises of nonpublic schools by public school personnel and only when requested by nonpublic school representatives.

The constitutional test under the establishment clause is as follows:

> "First, the statute must have a secular legislative purpose . . . . Second, it must

> have a 'primary effect' that neither advances nor inhibits religion . . . . Third, the statute and its administration must avoid excessive government entanglement with religion. . . ." [citations omitted] Meek v. Pittenger, supra, 421 U.S. at 358.

The court held that the provision of remedial educational services and guidance counseling violated that test:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S., at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.[21] . . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." [footnote omitted]. Id., 421 U.S. at 370-372.

In footnote 21, the court excepted the provision of diagnostic services from this constitutional infirmity:

> "21. The 'speech and hearing services' authorized by Act 194, at least to the

> extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools. . . ."

Subsequent to the Meek decision, Ohio passed legislation which attempted to provide certain services to nonpublic school children in a manner conforming to the teachings in Meek. In Ohio Rev. Code Ann. Section 3317.06 (Supp. 1976), the state among other things, allowed the expenditure of public funds:

> "(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.
>
> * * *
>
> (F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service."

It was also provided that no school district would render health or remedial services to nonpublic school pupils unless such services were made available to pupils attending the public schools within the district. The personnel providing the services were employees of the local board of education or physicians hired on a contractual basis with the purpose of the services being to determine the pupil's deficiency or need of assistance. The treatment of any defect took place off the premises of the nonpublic school.

The United States Supreme Court upheld the constitutionality of the statute:

> "This Court's decisions contain a common thread to the effect that the provision of health services to all school children -- public and nonpublic -- does not have the primary effect of aiding religion. . . . . Indeed, appellants recognize this fact in not challenging subsection (E) of the statute that authorizes publicly funded

> physician, nursing, dental, and optometric services in nonpublic schools. We perceive no basis for drawing a different conclusion with respect to diagnostic speech and hearing services and diagnostic psychological services." [footnote omitted]. Wolman v. Walter, supra, 433 U.S. at 242.

The court considered the diagnostic services to be different from teaching or counseling services because diagnostic services have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Furthermore, the diagnostician has only limited contact with the child which involves the use of objective and professional testing methods to detect students in need of treatment. Id., 433 U.S. at 244.

> "We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that Sections 3317.06(D) and (F) are constitutional." Id.

The rendering of therapeutic services was also taken up in the Wolman decision. The statute provided for various services including therapeutic psychological, speech, hearing, guidance and counseling services, to be provided to nonpublic school students but in public schools, public centers or mobile units located off of the nonpublic premises as determined by the state. Again, the services were required to be at least equal to those provided for students in public schools.

The court held:

> ". . . that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions

> on public property creates an excessive entanglement between church and state." Id. 433 U.S. at 248.

The court was careful to note, however, that the programs are not intended to influence the classroom activities in the nonpublic schools. It would be constitutionally improper for counseling or remedial teachers to get involved in curriculum planning and selection except for long-term, broad scale planning of career choices and in general areas of study. Id. 433 U.S. at 246, fn. 13.

Applying the Supreme Court's standards as explained in these opinions, we conclude that the provision by public employees at public expense of speech therapy or public health lectures on general health and safety topics to pupils of sectarian schools on the premises of such a school violates the Establishment Clause of the First Amendment for the reasons stated in those opinions. See also, Stark v. St. Cloud State University, 802 F.2d 1046, 1050-1052 (8th Cir. 1986) for discussion of state-sponsored teaching in sectarian schools creating an impermissible perception in students' minds that the state supports the sectarian school and its religious message.

It should be made clear, however, that the provision of emergency medical services, such as in the case of accident or illness, on school grounds, is not prohibited.[1] Also, in regard to teaching on public health matters, we do not conclude that such teaching is prohibited in all circumstances. For instance, the provision of strictly public health information on sectarian school premises regarding matters of an urgent nature, such as in the case of teaching preventative measures during disease epidemics, would not be prohibited by either federal or state constitutions.

3. APPLICABLE STATE CONSTITUTIONAL PROVISIONS

In Senator Quick's third question, he asks whether the constitutional provisions limiting the ability of public school districts to serve parochial school students apply in a similar way to county health centers.

The following constitutional provisions which have been quoted previously in this opinion have been held to limit public school districts: Article I, Sections 6 and 7, and Article IX, Section 8, of the Missouri Constitution. McVey v. Hawkins, 258 S.W.2d 927 (Mo. banc 1953) and Paster v. Tussey, supra. These constitutional provisions are also applicable to county health centers since those centers expend funds which are

"public funds" and which are in the "public treasury". State ex rel. St. Louis Police Relief Association v. Igoe, 340 Mo. 1166, 107 S.W.2d 929, 933 (1937).

In addition to the above constitutional provisions, Article IX, Section 5, Missouri Constitution, has also been held to limit school districts. McVey v. Hawkins, supra, and Special District for Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. banc 1966). That section provides:

> "The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

This provision is not applicable to county health centers since by its very terms it is concerned only with limiting state money preserved as "a public school fund" for the purpose of "establishing and maintaining free public schools". The county health centers do not expend money from any such fund. Sections 205.020 and 205.042.3, RSMo 1986.

CONCLUSION

It is the opinion of this office that:

1. The Establishment Clause of the First Amendment of the United States Constitution, as applicable to this state through the Fourteenth Amendment, prohibits county health centers from providing speech therapy services and certain public health lectures to the students of sectarian schools on the premises of those schools during normal school hours.

2. Neither the Establishment Clause of the First Amendment of the United States Constitution, nor Article I, Sections 6 and 7, nor Article IX, Section 8, of the Missouri Constitution prohibit county health centers from providing diagnostic and screening health services to the students of sectarian schools, whether or not on the grounds of those schools.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

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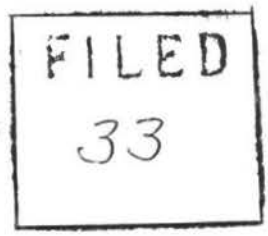
[1]Subsequent to and relying upon Wolman v. Walter, supra, a federal district court upheld, under the Establishment Clause, a New York law which provided for students within parochial schools to get physician, nursing and dental services, diagnostic psychological and speech services, and dental prophylaxis, medical history, health screening and maintenance of cumulative health record services, vision and hearing tests and emergency services performed on parochial school grounds. The statute also provided for therapeutic and remedial services to be rendered in a "religiously neutral location". Filler v. Port Washington Union Free School District, 436 F.Supp. 1231, 1239 (E.D. N.Y. 1977).

FIRE PROTECTION DISTRICTS:
HEALTH INSURANCE:
INSURANCE:

Directors of a fire protection district are eligible for health insurance benefits from the fire protection district pursuant to the provisions of Section 67.150, RSMo 1986.

April 14, 1989

OPINION NO. 33-89



The Honorable Tom McCarthy
Senator, District 26
State Capitol Building, Room 427
Jefferson City, Missouri 65101

Dear Senator McCarthy:

This opinion is in response to your question asking:

> Are Directors of Fire Protection Districts established and conducting business under Chapter 321 of the Revised Statutes of Missouri eligible for health insurance benefits under Section 67.210 of the Revised Statutes of Missouri since the wording includes officers and employees?

Section 67.210, RSMo 1986, provides:

> 67.210. Political subdivisions may provide health insurance benefits when, to whom.--Any political subdivision which provides or pays for health insurance benefits for its officers and employees may also provide or pay for all or part of such benefits, as may be determined by the governing body of the political subdivision, for the dependents of its officers and employees.

Section 321.010, RSMo 1986, provides in pertinent part:

> 321.010. Definitions--election procedure.--1. A "fire protection district" is a political subdivision which is organized and empowered to supply

> protection by any available means to persons and property against injuries and damage from fire and from hazards which do or may cause fire, and which is also empowered to render first aid for the purpose of saving lives, and to give assistance in the event of an accident or emergency of any kind. The district must consist of contiguous tracts or parcels of property containing all or parts of one or more counties, and may include within its boundaries, or may be contiguous with, any city, town or village.
>
> * * *

Section 67.150, RSMo 1986, provides in pertinent part:

> 67.150. Insurance for elected officials and employees, political subdivision may contribute--contracting procedure.-- 1. The governing body of any political subdivision may utilize the revenues and other available funds of the subdivision, as a part of the compensation of the elected officials and employees of the subdivision, to contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or part of hospitalization or medical expenses, life insurance or similar benefits for the subdivision's elected officials and employees.
>
> * * *

It is well settled that "the 'right to compensation for the discharge of official duties is purely a creature of statute.'" Crites v. Huckstep, 619 S.W.2d 328, 330[1] (Mo. App., E. D. 1981). Accordingly, "a public officer claiming compensation for official duties must rely on a statute authorizing payment." State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350[13] (Mo. App., W. D. 1980). Statutes which grant public officials compensation are strictly construed against them. Smith v. Pettis County, 345 Mo. 839, 136 S.W.2d 282, 285[4] (1940).

Pursuant to Section 321.010.1, RSMo 1986, a fire protection district is a political subdivision. Yet, the directors of fire protection districts are not entitled to health insurance benefits under Section 67.210, RSMo 1986. Section 67.210 is

limited to extending health insurance coverage to "the dependents of its [a political subdivision's] officers and employees."

The directors of fire protection districts may, however, receive health insurance protection under the provisions of Section 67.150, RSMo 1986. Section 67.150 allows "[t]he governing body of any political subdivision may utilize the revenues and other available funds of the subdivision, as a part of the compensation of the elected officials and employees of the subdivision, ..." Therefore, the directors of fire protection districts are eligible for health insurance benefits under Section 67.150, RSMo 1986.

CONCLUSION

It is the opinion of this office that directors of a fire protection district are eligible for health insurance benefits from the fire protection district pursuant to the provisions of Section 67.150, RSMo 1986.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ECONOMIC DEVELOPMENT,
DEPARTMENT OF:
EDUCATIONAL INSTITUTIONS:
HEALING ARTS, BOARD OF:
PROFESSIONAL REGISTRATION,
DIVISION OF:

The phrase "duly chartered educational institution" as used in Section 345.025.1(1), RSMo 1986, does not include preschool entities, day care centers and rehabilitation centers which are primarily custodial but include educational or instructional terms in their charters, and the phrase "in the employ of" as used in Section 345.025.1(1) does not include independent contractors.

September 6, 1989

OPINION NO. 36-89

Carl M. Koupal, Jr., Director
Department of Economic Development
P.O. Box 1157
Jefferson City, MO 65102-1157

Dear Director Koupal:

This opinion is in response to your questions asking:

> I. Does the term "duly chartered educational institution" as it is used in Section 345.025.1(1) include all corporations chartered by the Missouri Secretary of State which includes educational services or instructional services in its statement of purpose? For example does this refer to preschool entities, day care centers and rehabilitation centers, who are primarily custodial but have included educational or instructional terms in their charters?
>
> II. Does the term "in the employ of" as it is used in Section 345.025.1 include independent contractors providing services for federal, state, county or municipal agencies of duly chartered educational institutions?

Chapter 345, RSMo, is the Licensure Act for Professional Speech Pathologists and Professional Clinical Audiologists. Section 345.025, RSMo 1986, lists persons exempt from the licensure requirements of Chapter 345. Subsection 1(1) of such section provides:

> 345.025. Persons exempted from the provisions of this chapter.--1. The provisions of this chapter do not apply to:
>
> (1) The activities, services, and the use of an official title on the part of a person in the employ of a federal, state, county, or municipal agency, or a duly chartered educational institution insofar as such services are part of the duties of his office or position with such agency or institution; [Emphasis added.]

* * *

In order to answer your first question, it must be determinated what constitutes a duly chartered educational institution. Cases have held that an educational institution is one where "education is the primary function of the institution". Kneeland v. National Collegiate Athletic Association, 650 F.Supp. 1076, 1090 (W.D. Tex. 1986), rev'd on other grounds 850 F.2d 224 (5th Cir. 1988), cert. denied 109 S.Ct. 868 (1989); LaManna v. Electrical Workers Local Union No. 474, 518 S.W.2d 348, 352 (Tenn. 1974). Institutions where educational or instructional services were incidental to their primary function have been held not to be an educational institution for purposes of disclosure of student records and tax exemptions. See Kneeland v. National Collegiate Atheletic Association, supra; LaManna v. Electrical Workers Local Union No. 474, supra.

We conclude that to be a duly chartered educational institution for purposes of Section 345.025.1(1), education must be the primary function of the institution. Merely including educational services or instructional services in its statement of purposes in its charter is not sufficient to bring the institution within the exemption provided in Section 345.025.1(1). Therefore, preschool entities, day care centers and rehabilitation centers which are primarily custodial but include educational or instructional terms in their charters are not "duly chartered educational institutions" for purposes of Section 345.025.1(1).

In response to your second question, the phrase "in the employ of" does not include independent contractors. That is because the term, as it is used in the statute, implies an employee/employer relationship which is distinct from a person who is an independent contractor. The difference is found in the amount of direction and control exercised by an independent

contractor as opposed to that exercised by an employee. An independent contractor is paid for a final product; however, the method, hours and materials implemented to arrive at that final product remain with the discretion of the independent contractor. Huddleston v. Gitt and Sons Realty, 708 S.W.2d 149 (Mo. App. 1985); Handley v. State, Division of Employment Security, 387 S.W.2d 247 (Mo. App. 1965). Therefore, persons who are independent contractors are not exempt under the provisions of Section 345.025.1(1).

CONCLUSION

It is the opinion of this office that: (1) the phrase "duly chartered educational institution" as used in Section 345.025.1(1), RSMo 1986, does not include preschool entities, day care centers and rehabilitation centers which are primarily custodial but include educational or instructional terms in their charters, and (2) the phrase "in the employ of" as used in Section 345.025.1(1) does not include independent contractors.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

January 6, 1989

OPINION LETTER NO. 39-89

FILED
39

Robert B. Paden
DeKalb County Prosecuting Attorney
DeKalb County Courthouse
Maysville, Missouri 64469

Dear Mr. Paden:

This opinion letter is in response to your questions pertaining to the applicability of Sections 263.245 and 263.247, RSMo Supp. 1988, to township organization counties, particularly the county of DeKalb. You further describe the problem as follows:

> The problem arises with the interpretation of Section 231.150 et seq dealing with township organization counties such as DeKalb, Daviess, Gentry & Harrison, and the presumed responsibility for the maintenance of roads with a township special road district as created by Section 233.320 et seq, all of which have been done in this county to create special road districts contiguous with the boundaries of each of the nine townships.
>
> Your attention is particularly called to Section 233.340, Paragraph 3, as relates to the special road districts, which gives the commissioners of said special road districts "sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district to construct, improve and repair such highways, bridges and culverts -------."
>
> It has therefore been my opinion for a number of years that a township organization county, having created special

> road districts which are contiguous with the boundaries of each township, has no such thing as "County Roads".
>
> * * *
>
> The County Clerk's office advises that in 263.245 that there is very little property in the county designated as county right-of-way, or that the county has a maintenance easement over.
>
> The end question is, does the term "County Roads" as applied in Chapter 263 have any real meaning? If the county (which has voted approval under 263.247) complies with sub-paragraph 3 of 263.245, will they actually be able to collect the cost of brush removal as set forth in sub-paragraph 2 of the same section?

A copy of Sections 263.245 and 263.247, RSMo Supp. 1988, is attached hereto as Appendix I. Section 263.245.1 provides that landowners in certain specified counties having a township form of government "shall eradicate all brush growing on such owner's property that is designated as the county right-of-way or county maintenance easement part of such owner's property and which is adjacent to any county road." Section 263.245.2 provides in part:

> The county commission, either upon its own motion, or upon receipt of a written notice requesting the action from any residents of the township in which the county road bordering the lands in question is located or upon written request of any person regularly using the county road, may eradicate such brush so as to allow easy access to the land described in subsection 1 of this section. . . .

The term "county road" is not defined in Section 263.245 or Section 263.247. Since there appears to be no controlling state statutes or cases which define "county road" for purposes of Sections 263.245 and 263.247, the term "county road" should be construed to give effect to the apparent intent of the legislature. A statute is to be given that interpretation which corresponds with the legislative objective and, where necessary, the strict letter of the statute must yield to the manifest

intent of the legislature. State v. Williams, 693 S.W.2d 125 (Mo. App. 1985). BCI Corporation v. Charlebois Construction Co., 673 S.W.2d 774 (Mo. banc 1984).

The apparent intent of the legislature in enacting Sections 263.245 and 263.247 is to allow the voters of the counties described in Section 263.245.1 to vote on whether they want to require those owning property along county roads to eradicate the brush growing on the "county right-of-way" or "county maintenance easement" and to give the county commission the authority to remove such brush and impose a lien on such property for the cost of such brush removal. Given the legislature's apparent intent, and the absence of a definition of "county road" in Sections 263.245 and 263.247, "county road" for purposes of Sections 263.245 and 263.247 should be defined to include any public road lying within a county's boundaries that is not otherwise under the authority of a political entity such as the state or an incorporated city, town, or village.

Thus, even though all of DeKalb County may rest within one of the special road districts created pursuant to Section 233.320, RSMo 1986, DeKalb County could still have "county roads" within the meaning of Sections 263.245 and 263.247. This would be true even though the special road district commissioners would have exclusive and entire control over all public highways, bridges, and culverts within the district pursuant to Section 233.340.3, RSMo 1986.

It is the opinion of this office that there are "county roads" in DeKalb County for purposes of Sections 263.245 and 263.247, RSMo Supp. 1988, even though such roads may lie within a special road district.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

APPENDIX I

DESTRUCTION OF WEEDS

Sec.

DESTRUCTION OF WEEDS

263.245. Brush adjacent to county roads, to be removed, certain counties—county commission may remove brush, when, procedures (Daviess, DeKalb, Gentry and Harrison counties).—1. All owners of land in any county with a township form of government, located north of the Missouri River and having no portion of the county located east of U.S. Highway 65, with a population of less than fifteen thousand inhabitants and having as its county seat a city with greater than one thousand inhabitants, shall eradicate all brush growing on such owner's property that is designated as the county right-of-way or county maintenance easement part of such owner's property and which is adjacent to any county road. Such brush shall be cut, burned or otherwise destroyed as often as necessary in order to keep such lands accessible for purposes of maintenance and safety of the county road.

2. The county commission, either upon its own motion, or upon receipt of a written notice requesting the action from any residents of the township in which the county road bordering the lands in question is located or upon written request of any person regularly using the county road, may eradicate such brush so as to allow easy access to the land described in subsection 1 of this section, and for that purpose the county commission, or its agents, servants, or employees shall have authority to enter on such lands without being liable to an action of trespass therefor, and shall keep an accurate account of the expenses incurred in eradicating the brush, and shall verify such statement under seal of the county commission, and transmit the same to the officer whose duty it is or may be to extend state and county taxes on tax books or bills against real estate. Such officer shall extend the aggregate expenses so charged against each tract of land as a special tax, which shall then become a lien on such lands, and be collected as state and county taxes are collected by law and paid to the county commission and credited to the county eradication fund.

3. Before proceeding to eradicate brush as provided in this section, the county commission of the county in which the land is located, shall notify the owner of the land of the requirements of this law by certified mail, return receipt requested, from a list supplied by the officer who prepares the tax list, and shall allow the owner of the land thirty days from acknowledgement date of return receipt, or date of refusal of acceptance of delivery as the case may be, to eradicate all such brush growing on land designated as the county right-of-way or county maintenance easement part of such owner's land and which is adjacent to the county road. In the event that the property owner cannot be located by certified mail, notice shall be placed in a newspaper of general circulation in the county in which the land is located at least thirty days before the county commission removes the brush pursuant to subsection 2 of this section. Such property owner shall be granted an automatic thirty-day extension due to hardship by notifying the county commission that such owner cannot comply with the requirements of this section, due to hardship, within the first thirty-day period. The property owner may be granted a second extension by a majority vote of the county commission. There shall be no further extensions. For the purposes of this subsection, **"hardship"** may be financial, physical or any other condition that the county commission deems to be a valid reason to allow an extension of time to comply with the requirements of this section.

4. County commissions shall not withhold rock, which is provided from funds from the county aid road trust fund, for maintaining county roads due to the abutting property owner's refusal to remove brush located on land designated as the county right-of-way or county maintenance easement part of such owner's land. County commissions shall use such rock on the county roads, even though the brush is not removed or county commissions may resort to the procedures in this section to remove the brush.

(L. 1987 H.B. 734 § 1)

263.247. Brush removal, county option (Daviess, DeKalb, Gentry and Harrison counties).—1. Section 263.245 shall become effective only in those counties described in subsection 1 of section 263.245 in which the governing body of the county submits to the voters of the county, at a regularly scheduled county-wide election, a proposal to implement the provisions of section 263.245. The governing body of the county shall give notice of the election by publication in a newspaper of general circulation in the county for two consecutive weeks, the last insert of which shall be within ten days of the election.

2. The ballot of submission shall include, but not be limited to, the following language:

Shall the county of ..... (County's name) enforce brush removal adjacent to county roads?

☐ Yes

☐ No

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

3. If a majority of the votes cast at the election are in favor of such proposal, section 263.245 shall become effective in that county. If a majority of the votes cast at the election are opposed to such proposal, section 263.245 shall not become effective in that county.

(L. 1987 H.B. 734 § 2)

COUNTIES:
COUNTY COLLECTORS:
DRAINAGE DISTRICT:

A county collector in a third class, nontownship county collecting taxes pursuant to Section 242.540, RSMo 1986, for drainage districts organized in circuit court must collect on behalf of the county the fees provided for in Section 52.275, RSMo Supp. 1988, and deposit these fees into the county general revenue fund, unless the collector and the county have contracted to allow the collector to retain these fees, or a part of them, pursuant to subsection 3 of Section 52.269, RSMo Supp. 1988.

July 21, 1989

OPINION NO. 44-89

The Honorable Norman Merrell
Senator, District 18
State Capitol Building, Room 423
Jefferson City, MO 65101

Dear Senator Merrell:

This opinion is in response to your question asking:

> Whether the provisions of Section 52.269.3, RSMo Supp. 1988 providing that certain fees for county collectors cease after the 1988 general election, apply to county collectors collecting taxes pursuant to Section 242.540, RSMo 1986, for drainage districts organized in circuit court.

We understand your question relates to a third class, nontownship county.

Section 52.275, RSMo Supp. 1988, provides:

> 52.275. Drainage and levee tax commissions.--The county and township collectors for collecting taxes for drainage and levee districts shall collect on behalf of the county and pay into the county general fund the following amounts: In counties of the second class having less than one hundred thousand inhabitants and in counties of the third class, one and one-half percent of the amount he collects on current taxes; in counties of the third

> class where the collector is required by law to maintain a branch office, two and one-fourth percent of the amount he collects on current taxes; in counties of the fourth class, two percent of the amount he collects on current taxes; and in counties of the second class having less than one hundred thousand inhabitants and in all counties of the third and fourth classes, two percent of the amount he collects on delinquent drainage and levee taxes.

The 1987 amendment to Section 52.275 provided that all fees collected pursuant to this section are to be collected on behalf of the county and paid into the county general revenue fund. See Laws of Missouri, 1987, page 400, 413. Prior to 1987 all fees collected pursuant to this section were retained by the collector.

Before Section 52.275 was enacted in 1959 (see Laws of Missouri, 1959, Senate Bill No. 62), county collectors collecting taxes for drainage districts organized in circuit court were authorized under Section 242.550, RSMo 1959, to retain fees for collecting those taxes. Chapter 243, RSMo 1959, Drainage Districts Organized in County Court, had no provision that allowed county collectors to retain fees for collecting taxes in these drainage districts. Section 246.040, RSMo 1959, which was applicable to all drainage districts, prescribed a fee for a collector collecting taxes for drainage and levee districts. In 1961, during the legislative session following the enactment of Section 52.275, Section 242.550, RSMo 1959, authorizing county collectors to retain a fee for collecting taxes of drainage districts organized in circuit court, and Section 246.040, RSMo 1959, which allowed county collectors to retain a fee for collecting any ditch or levee tax, whether the district was organized in circuit court or county court, were repealed. See Laws of Missouri, 1961, page 444. As a result of these legislative revisions, Section 52.275 remained as the only section authorizing county collectors to retain a fee for collecting taxes for drainage districts organized in either circuit court or county court (now called county commission).

During the 1987 legislative session, the General Assembly adopted Section 52.269, RSMo, which provided county collectors, except those in certain first class counties, with an annual salary. See Laws of Missouri, 1987, page 400, 412. Before the passage of Section 52.269, most county collectors derived a major part of their compensation from fees they retained for

collecting certain taxes, including fees authorized by Section 52.275 for collecting ditch and levee taxes. Since the General Assembly provided these county collectors with an annual salary under Section 52.269, other sections authorizing county collectors to retain a fee for collecting certain taxes were changed to require that those fees be collected on behalf of the county and paid into the county general revenue fund. These sections included Section 52.275.

Subsection 3 of Section 52.269, RSMo Supp. 1988, after being amended during the 1988 legislative session, provides:

> 52.269. Compensation of county collector--training program, attendance required, when, expenses, compensation--certain fees may be retained (certain counties).--
>
> * * *
>
> 3. Any provision of law to the contrary notwithstanding, any fee provided for in subsection 1 of section 52.250 or 52.275, when collected on ditch and levee taxes, shall not be collected on behalf of the county and deposited into the county general revenue fund. Such fees shall be retained by the collector as compensation for his services, in addition to any amount provided for such collector in this section, until the next general election after January 1, 1988. After the general election following January 1, 1988, the governing body of the county may contract with a collector for the retaining of such fees or a portion thereof. Any fee which may be retained by the collector under the terms of such contract may be retained in addition to all other compensation provided by law.

Subsection 3 allows county collectors in certain situations to retain fees provided for in Sections 52.250 and 52.275 when collected on ditch and levee taxes despite the language in Sections 52.250 and 52.275 requiring those fees to be collected on behalf of the county and paid into the county general revenue fund.

However, subsection 4 of Section 52.269, RSMo Supp. 1988, provides:

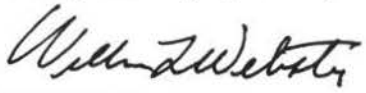
> 4. Except as provided in subsection 3 of this section, after the next general election following January 1, 1988, all fees collected by the collector shall be collected on behalf of the county and deposited in the county general revenue fund.

After the general election following January 1, 1988, the county collector is not entitled to retain any of the fees collected pursuant to Sections 52.250 and 52.275 on ditch and levee taxes, unless the collector and the county have contracted for retention of these fees, or a part of them, as provided in subsection 3 of Section 52.269. As demonstrated above, Section 52.275 is the only section authorizing a fee for county collectors collecting taxes for drainage districts organized in circuit court. Therefore, county collectors collecting taxes pursuant to Section 242.540, RSMo 1986, for drainage districts organized in circuit court must collect on behalf of the county the fees provided for in Section 52.275, and deposit these fees into the county general revenue fund, unless the collector and the county have contracted to allow the collector to retain these fees, or a part of them, pursuant to subsection 3 of Section 52.269.

CONCLUSION

It is the opinion of this office that a county collector in a third class, nontownship county collecting taxes pursuant to Section 242.540, RSMo 1986, for drainage districts organized in circuit court must collect on behalf of the county the fees provided for in Section 52.275, RSMo Supp. 1988, and deposit these fees into the county general revenue fund, unless the collector and the county have contracted to allow the collector to retain these fees, or a part of them, pursuant to subsection 3 of Section 52.269, RSMo Supp. 1988.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

SCHOOLS:
TEACHERS CERTIFICATES:
TEACHERS TENURE:
VOCATIONAL EDUCATION:
VOCATIONAL TRAINING:

Instructors who are employed by a local school district to instruct in programs funded pursuant to the Job Training Partnership Act, 29 U.S.C. Section 1501 et seq., are "teachers" as that term is defined in Section 168.104(7), RSMo 1986, of the Missouri Teacher Tenure Act.

April 4, 1989

OPINION NO. 46-89

FILED
46

The Honorable Dennis Smith
Senator, District 30
State Capitol Building, Room 328
Jefferson City, Missouri 65101

Dear Senator Smith:

This opinion is in response to your question asking:

> Whether instructors, who are employed by the School District of Springfield R-12 and who instruct at the Graff Vo-Tech Extension Skills Center in programs funded pursuant to the Job Training Partnership Act, Title 29 U.S.C. Section 1501, et seq., are "teachers" under the Missouri Teacher Tenure Statute, Section 168.102-168.130, RSMo.

The School District of Springfield R-12 (the District) has entered into an agreement with the Department of Elementary and Secondary Education (the Department) establishing a project to provide skill training programs (the Project) for individuals who are referred to the Project under the procedures and guidelines established in the Job Training Partnership Act, 29 U.S.C. Section 1501, et seq. (the Federal Act) and regulations promulgated pursuant thereto, 20 C.F.R. 626.1, et seq. A copy of the agreement is attached hereto as Appendix A. The Federal Act has as its purpose "to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment." 29 U.S.C. Section 1501. The issues raised in the above-quoted question do not make it necessary to go into a detailed description of the structure of the funding and delivery of services under the Federal Act. It

is sufficient to state that the Department receives federal funds under the Federal Act and has the authority to contract with other entities, such as the District, to provide the educational or training services to eligible participants. 29 U.S.C. Sections 1517 and 1533.

The District contracts with individuals to serve as teachers in the Project. A form contract is attached hereto as Appendix B. The third of the Terms and Conditions requires:

> "The instructor will meet the certification requirements of the Missouri Department of Elementary and Secondary Education."

The Missouri Teacher Tenure Act (the Tenure Act) is set forth at Sections 168.102 to 168.130, RSMo 1986. The Tenure Act creates the classifications of "probationary teacher" and "permanent teacher" and assigns certain legal attributes to those classifications regarding the relationship between the teacher and the local board of education which employs the teacher. Whether the provisions of the Tenure Act apply to the school district employees who have contracted to teach in the Project in question here depends on whether they fit within the definition of "teacher" in subdivision (7) of Section 168.104, RSMo 1986. Hudson v. Marshall, 549 S.W.2d 147 (Mo.App., Spr.D. 1977). That definition provides:

> "(7) 'Teacher', any employee of a school district, except a metropolitan school district, regularly required to be certified under laws relating to the certification of teachers, except superintendents and assistant superintendents."

There is no dispute that these individuals are "employees of the school district" and there is no dispute that the District is not a metropolitan school district. The only issue to be resolved is whether the teachers in the Project are "regularly required to be certified under laws relating to the certification of teachers, ..." Section 168.104(7), RSMo 1986.

> "In resolving the issue of whether plaintiff was a 'teacher' as defined in section 168.104(7), this court may consider 'the general school laws, laws dealing with special school subjects, school laws enacted at the same time or on widely different dates, school laws once in force and later

> repealed, and contemporary history of those enactments.'" Hudson v. Marshall, supra, at 151.

The source of the requirement to be certificated must be in the law itself and not in a requirement set forth in the contract or otherwise by the local school board. Id. at 153.

In Hudson, the court identified Section 168.011 as the relevant law to determine whether the employee in that case was required to be certificated. Section 168.011, RSMo 1986 (Laws of Missouri, 1984, H.B. Nos. 1457 and 1501, Section 2, effective September 1, 1988), provides in pertinent part:

> "1. No person shall be employed to teach in any position in a public school until he has received a valid certificate of license entitling him to teach in that position."

That statute does not require the teachers in the Project to be certificated because they do not teach in a "public school" as that term is used in Section 168.011. The relevant definition of "public school" is found in Section 160.011(7), RSMo 1986, which provides:

> "As used in chapters 160, 161, 162, 163, 164, 165, 167, 168, 170, 171, 177 and 178, RSMo, unless the context otherwise requires:
>
> * * *
>
> (7) 'Public school' includes all elementary and high schools operated at public expense;"
>
> * * *

The terms elementary and high schools are defined in subdivisions (2) and (4) of the same statute:

> "(2) 'Elementary school' means a public school giving instruction in two or more grades not higher than the eighth grade;
>
> * * *
>
> (4) 'High school' means a public school giving instruction in two or more

> grades not lower than the ninth nor higher than the twelfth grade;"

That the certification requirement of Section 168.011 is restricted to elementary school and high school teachers is made explicit in Section 168.081, RSMo 1986 (Laws of Missouri, 1984, H.B. Nos. 1457 and 1501, Section 2, effective September 1, 1988) which provides:

> "After September 1, 1988, no person without a valid Missouri certificate shall:
>
> (1) Engage in the practice of teaching or the performance of education duties in grades kindergarten through twelve in any public school in the state;
>
> (2) Act as a school administrator in any public school district."

Since the courses in question here are not part of the elementary or high school of the District, the teachers of those courses are not regularly required by Sections 168.011 and 168.081 to be certificated.

This does not end our inquiry, however, since Sections 168.011 and 168.081 are not the only "laws relating to the certification of teachers" as that term is used in Section 168.104(7). In the question presented, the individuals are employed to teach in the area of vocational education as that term is defined in Section 178.420(1), RSMo 1986:

> "Unless a different meaning is clearly required by the context, the following words and phrases as used in sections 178.420 to 178.580 mean:
>
> (1) 'Vocational education', education of less than college grade, the controlling purpose of which is to fit for profitable employment;"
>
> * * *

The law, as expressed in Section 178.450, RSMo 1986, requires the State Board of Education to provide for the certification of teachers in vocational education:

> "The state board of education shall make studies and investigations relating to prevocational and vocational training in agriculture, industrial, home economics and commercial subjects; . . .; establish standards for, test the qualifications of, and issue certificates to the teachers and supervisors of such subjects, and cooperate in the maintenance of schools, departments and classes supported and controlled by the public for the preparation of teachers and supervisors of such subjects." [Emphasis added.]

The conclusion that certification is a requirement for vocational education teachers is based particularly on the use of the word "shall" in the above-quoted statute. "The use of the word 'shall' indicates a mandate and will usually be interpreted to command the doing of whatever is required." Howard v. Banks, 544 S.W.2d 601, 604 (Mo. App. 1976), and State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W.2d 290, 296 (Mo. 1975).

In addition, the State Board of Education's administrative rules on vocational education reflect the same interpretation of Section 178.450.

> "Missouri law and Department of Elementary and Secondary Education regulations require all teachers and administrators in vocational education programs to be specifically certificated for their teaching assignments. . . ." Handbook for Vocational Education in Missouri, page 31, promulgated as administrative rule at 5 CSR 60-120.020.

The interpretation of a statute by an agency charged with its administration is "entitled to great weight." Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972).

It has been brought to our attention that the Department's practice has been not to require the certification of teachers in nonaccredited JTPA programs. In the administrative rule promulgated by the Department entitled "Standards For The Approval Of Courses For The Education of Veterans, Vocational Rehabilitation And The Job Training Partnership Act, P.L.

97-300," the Department provides as follows in regard to nonaccredited courses:

> "(3) Nonaccredited Courses. The provisions of this section apply to courses which cannot be considered as accredited courses under section (2) of this rule.
>
> * * *
>
> (G) Personnel. There shall be sufficient, qualified and capable personnel connected with the institution to insure good administration, supervision and instruction.
>
> * * *
>
> 3. All instructors must be proficient in the trade or occupation to be taught, as evidenced by at least three (3) years of experience beyond the learning stage in the trade, occupation or subject or shall possess a college degree with at least a minor in the subject involved. These qualifications must be clearly shown on a personnel record form submitted for each person on the school staff."

5 CSR 30-4.020(3).

This rule does not address the issue of whether certification is required when it sets forth the experience and degree requirements for teachers. According to departmental personnel, this rule was meant to apply only to situations in which individual referrals were being made into regular classes in public vocational technical schools and in private proprietary schools not accredited by a nationally recognized accrediting agency. Since teachers in the public vocational technical schools are going to be certificated under the vocational education laws anyway, this rule was primarily aimed at the nonaccredited private proprietary school classes. However, it is possible to argue that the rule's silence on the subject of certification could be taken to mean that certification is not required for nonaccredited JTPA courses.

There is no question that the JTPA courses which are the subject of this opinion request come within the term "vocational education" as defined in Section 178.420(1) and as used in

Section 178.450. Regardless of what the Department's "practice" is concerning the certification of teachers in nonaccredited JTPA courses and regardless of what it intended by 5 CSR 30-4.020(3)(G)3, Section 178.450 requires certification of teachers in all courses coming within the definition of vocational education in Section 178.420(1). Therefore, teachers in the JTPA program in question are required by laws relating to the certification of teachers to be certificated and are "teachers" as that term is defined in Section 168.104(7) of the Missouri Teacher Tenure Act.

CONCLUSION

It is the opinion of this office that instructors who are employed by a local school district to instruct in programs funded pursuant to the Job Training Partnership Act, 29 U.S.C. Section 1501 et seq., are "teachers" as that term is defined in Section 168.104(7), RSMo 1986, of the Missouri Teacher Tenure Act.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Employment Training Section
P.O. Box 480, Jefferson City, Missouri 65102
Job Training Partnership Act (JTPA)

JUN 30 1988

JTPA PROJECT OPERATING PLAN

Project Number: 08-0276-9-11	Type of Project: Skill Training	New Project	X
Period Covered by Project	From: 7/1/88 To: 6/30/89	Modification #	

Name and Address of Training Agency: Springfield Public Schools, Graff Extension Cen
237 South Florence, Springfield, MO 65806

Contact Person/Phone Number: Ron Holmes, Assistant Director 417 831-0092

PART I - BUDGET

Acct Code	Account Name	Admin	Participant Support	Training	Total
	ADMINISTRATION				
110	Administration				
130	Employment Generating Services				
	TOTAL ADMINISTRATION				
	PARTICIPANT SUPPORT				
210	Needs Based Payments				
220	Work Experience				
230	Child Care				
240	Transportation				
250	Exemplary Youth				
260	Other Participant Support				
	TOTAL PARTICIPANT SUPPORT				
	TRAINING				
310	Institutional Skill Training			226,000.00	226,000.00
320	On-the-Job Training				
330	Customized Training				
340	Remedial and Basic Skills				
350	Upgrading and Retraining				
360	Job Search & Job Club				
370	Exemplary Youth				
380	Work Experience				
390	Other Training-Part Related				
391	Other Training-NonPart Related				
	TOTAL TRAINING				
	GRAND TOTALS			226,000.00	226,000.00

SIGNATURE OF SCHOOL/AGENCY OFFICIAL: Paul J. Hagerty
Paul J. Hagerty, Superintendent — DATE: 6-29-88

APPROVED BY THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION BY:

Signature/Title: Frank Drake

Allocation of Costs:
A.
B.
C.

Training Agency Vendor No. _____

DESE JTPA 7A-4

OTHER COSTS	[illegible]	[illegible] 310	
Utilities			
Telephone			
Minor Remodeling			
Maintenance and Repair of Equipment			
Rental of Equipment			
Tuition		226,000.00	
Non-instructional Supplies			
Instructional Supplies			
MIS Costs			
Eligibility Determination			
Indirect Costs - Restricted Rate _____ %			
Other Training-Participant Related			
Other Training-Nonparticipant Related			
Other Costs: (Specify)			
SUBTOTAL - OTHER COSTS		226,000.00	
JTPA FUNDS - DESE JTPA 7A (COLUMN A)		226,000.00	
MATCH FUNDS- DESE JTPA 7A (COLUMN B)		-0-	
OTHER TRAINING PROGRAMS	JTPA	MATCH	TOTAL
320 On-the-Job Training	-		
380 Work Experience			

MO 500-01239 (5-87)

PROJECT OPERATING PLAN NARRATIVE
PART II

1. The following agency will give immediate supervision to this project:

   The Springfield Public Schools
   Graff Vo-Tech Extension Center
   237 South Florence
   Springfield, MO 65806
   Telephone Number - 417 831-0092

2, 3. Ronald E. Holmes, Assistant Director for Graff Vo-Tech Center, will be the chief contact person for this project and assume responsibility for participant records.

4. The program consists of three 18 week skill programs and Adult Basic Education support. The three programs will have continuous enrollment, admitting students each Monday. Trainees receive a certificate upon completion with competencies attained listed. Students who do not have the ability to reach all the competencies listed in 18 weeks may receive up to an additional six weeks of training, if mutual consent is obtained from the training agency and the Job Council of the Ozarks (administrative entity). Students who are not high school graduates will be required to commit extra time to a study program to prepare to take the GED exam. Although every effort is made to help students reach the training objectives, trainees who do not show satisfactory progress or have excessive absences will be terminated. These students will be referred to other agencies for additional help or a new job plan will be developed by the administrative entity. The maximum number in the three programs at one time will be 40.

   No classes will be held on the following dates:

July 4, 1988	Independence Day
July 25 - 29, 1988	Missouri Vocational Association Convention and Teachers Workshop Days
September 5, 1988	Labor Day
November 24 & 25, 1988	Thanksgiving
December 23 1988 - January 2, 1989	Christmas Vacation
January 20, 1989	Teacher Workshop Day
February 20, 1989	President's Day
March 24, 1989	Good Friday
May 29, 1989	Memorial Day

   No articles are to be constructed.

The General information regarding the three skill training programs is outlined below.

OCCUPATIONAL TITLE:

OFFICE OCCUPATIONS

Occupational Titles Code:

Bookkeeper - 210.382-014
File Clerk - 206.363-010
Stenographer - 202.363-014
Duplicating Machine Operator - 207.682-010
Transcribing Machine Operator - 203.582-010
Receptionist - 237.367-038
Clerk-Typist - 203.363-010
Secretary - 201.363-030
Typist - 203.582-066

The project will consist of one section of 50 trainees.

Length of Training:

Hours per week - 35 hours
Normal Training Time - 18 weeks
Maximum Training Time - 24 weeks
Daily training schedule - 8:00 a.m. to 3:30 p.m.

Course Information

Accounting I

Objective - to present the accounting cycle in its simplest form so that the student can analyze, record in journals, and post in a general ledger the financial data of a service business.

1. Set up a bookkeeping system
2. Make entries in a journal
3. Post to the ledger
4. Prepare financial statements - service business
5. Close the ledger - service business

Accounting II

Objective - will be developed throughout the year

1. Manage merchandising business records
2. Manage a checking account

3. Adjust the ledger
4. Prepare financial statements - merchandising business
5. Close the ledger - merchandising business
6. Manage payroll records

Personality Development for Business

Objective - will be developed throughout the year

1. Demonstrates personal attribute of dependability
2. Is well-groomed
3. Communicates well--written and spoken
4. Successfully works with others
5. Continued professional growth

Filing

1. File business correspondence
2. Set up a filing system

Clerical Office Procedures

Objective - will be developed throughout the year

1. Prepare mailable letters
2. Compose basic business letters
3. Type business reports
4. Sort and distribute mail
5. Meet the public
6. Manage the phone
7. Prepare travel arrangements and reports

Machines

Objectives - will be developed throughout the year

1. Add, subtract, multiply and divide on a 10-key adding machine
2. Add, subtract, multiply and divide on a calculator
3. Prepare a mailable copy from a transcriber
4. Prepare a mailable copy using a memory typewriter
5. File and store material using a memory typewriter

Word Processor

Task list provided by Industrial Advisory Committee

1. Write a document
2. Modify a document
3. File a document
4. Demonstrate understanding of all commands on the CRT system
5. Type a business letter and envelope
6. Type finance report
7. Type telegrams
8. Type a letter or report on a continuous form
9. Type checks, brochures and purchase orders
10. Fill in requested information on a standardized form using CRT system

Typewriting

Objective - will be developed throughout the year

1. Operate the typewriter
2. Type inner office memorandums
3. Type business letters
4. Address envelopes using the typewriter
5. Type columnar tables
6. Type columnar tables with horizontal and vertical ruling
7. Type columnar tables with horizontal and vertical ruling
8. Type a report in manuscript form
9. Type information on basic types of forms
10. Type a news release
11. Type a contractual agreement
12. Type financial statements

Shorthand

Objective - will be developed throughout the year

1. Read and write alphabetic characters
2. Memorize brief forms
3. Read and write amounts and figures
4. Phrasing
5. Recognize prefixes, suffixes, word beginnings and endings
6. Punctuation and application of grammar rules
7. Visualize symbols and write outlines
8. Transcribe shorthand dictation
9. Transcribe in mailable form

Normal Hours of Instruction - 630

OCCUPATIONAL TITLE:

TRANSPORTATION MECHANIC

Occupational Titles Code

Auto Mechanic - 620.261-010
Diesel Mechanic Helper - 625.684-010
Diesel Engine Tester - 625.261-010
Automobile-Radiator Mechanic - 620.381-010
Carburetor Mechanic - 620.281-034
Air Conditioning Mechanic - 620.281-010
Transmission mechanic - 620.281-062
Diesel Mechanic - 625.281-010
Brake Repairer - 620.281-026
Tune-up Mechanic - 620.281-066

The project will consist of one section of 20 trainees.

Length of Training:

Hours per week	- 35 hours
Normal Training Time	- 18 weeks
Maximum Training Time	- 24 weeks
Daily training schedule	- 3:30 pm - 11:00 pm

The maximum number in the program at one time will be 10.

Course Information

The course is designed as a cluster of both Auto Mechanics and Diesel Mechanics. The trainee will receive training in either of the fields mentioned. Since there is an "over-lap" of training (i.e. - some training is applicable in either field), the trainee will receive a well-rounded training program. The trainee will be given a choice of emphasis of his particular interest as determined between the trainee and his/her counselor.

Brake System

Objective - will be developed throughout the year

1. Inspect and repair drum brakes system
2. Inspect and repair disc brakes system

Air Conditioning

Objective - in working with the A/C unit the student will demonstrate a knowledge and understanding of operation safety, special tools, trouble shooting for malfunction, evacuation and charging an A/C unit and replacing defective parts.

1. Diagnose, service or repair air conditioning system

Cooling System

Objective - this unit will familiarize the student with the various types of cooling systems the operation and purpose of the cooling system components, inspection, maintenance and repair procedures.

1. Test, remove and repair cooling system

Power Train

Objective - will be developed through the year

1. Inspect and replace clutch
2. Remove, repair and replace standard transmission
3. Remove, repair and replace automatic transmission
4. Remove, repair and replace drive line
5. Remove, repair and replace rear end
6. Remove, repair or replace differential

Hydraulic System

Objective - will be developed throughout the year

1. Diagnose, repair and service hydraulic system

Electrical System

Objective - will be developed throughout the year

1. Diagnose, remove, service or repair electrical system
2. Diagnose, remove or repair starting system
3. Diagnose and repair lighting system

Engine Overhaul

Objective - will be developed throughout the year

1. Remove, repair, replace or overhaul engine
2. Inspect and repair valves
3. Diagnose and tune-up diesel or gasoline engine

Exhaust System

Objective - will be developed throughout the year

1. Diagnose and repair exhaust system

Suspension and Steering System

Objective - will be developed throughout the year

1. Inspect, repair and replace suspension system
2. Remove and replace springs
3. Remove, repair and replace gear box
4. Remove, repair and replace steering column

Fuel System

Objective - will be developed throughout the year

1. Remove, repair and replace fuel system

Air System

Objective - will be developed throughout the year

1. Diagnose and repair air intake

Electrical System

Objective - will be developed throughout the year

1. Remove, repair and replace charging system
2. Remove, repair and replace starting system
3. Test and replace battery
4. Inspect, repair and replace instrument panel

Accessories

Objective - will be developed throughout the year

1. Inspect, repair and charge air conditioner system

Normal Hours of Instruction - 630 hours

OCCUPATIONAL TITLE:

WELDING

Occupational Titles Code:

Arc Welder - 810.384-014
Gas Tungsten Arc Welder - 810.382-010
Gas Metal Arc Welder - 810.32-010 and 810.384-014
Gas Welder - 811.684-014

The project will consist of one section of 20 trainees

Length of Training:

Hours per week	- 35 hours
Normal Training Time	- 18 weeks
Maximum Training Time	- 24 weeks
Daily Training Schedule	- 8:00 am - 3:30 pm

The maximum number in the program at one time will be 10.

Course Information

Oxy-Acetylene

Objective - will be developed throughout the year

1. Butt weld in flat position
2. Tee weld in flat position
3. Lap weld in flat position
4. Outside corner weld in flat position
5. Butt weld in horizontal position
6. Lap weld in horizontal position
7. Tee weld in horizontal position
8. Outside corner weld in horizontal position
9. But weld in vertical position
10. Lap weld in vertical position
11. Tee weld in vertical position
12. Outside corner welding vertical position
13. Butt weld in overhead position
14. Lap weld in overhead position
15. Tee weld in overhead position
16. Outside corner weld in overhead position
17. Cut with oxy-acetylene cutting torch
18. Braze common joints with oxy-acetylene torch

Shielded Metal Arc

Objective - in this unit students will learn principles, equipment, materials, technical information, skills and applications of arch welding.

1. Butt weld in flat position
2. Tee weld in flat position
3. Lap weld in flat position
4. Outside corner weld in flat position
5. Butt weld in horizontal position
6. Tee weld in horizontal position
7. Lap weld in horizontal position
8. Outside corner weld in horizontal position
9. Butt weld in vertical position
10. Tee weld in vertical position
11. Lap weld in vertical position
12. Outside corner weld in vertical position
13. Butt weld in overhead position
14. Tee weld in overhead position
15. Lap weld in overhead position
16. Outside corner weld in overhead position

Gas Tungsten Arc

Objective - will be developed throughout the year

1. Butt weld in flat position
2. Lap weld in flat position
3. Tee weld in flat position
4. Outside corner weld in flat position
5. Butt weld in horizontal position
6. Lap weld in horizontal position
7. Tee weld in horizontal position
8. Outside corner weld in horizontal position
9. Butt weld in vertical position
10. Lap weld in vertical position
11. Tee weld in vertical position
12. Outside corner weld in vertical position
13. Butt weld in overhead position
14. Lap weld in overhead position
15. Tee weld in overhead position
16. Outside corner weld in overhead position

Gas Metal Arc

Objective - will be developed throughout the year

1. Butt weld in flat position
2. Lap weld in flat position
3. Tee weld in flat position
4. Outside corner weld in flat position

5. Butt weld in horizontal position
6. Lap weld in horizontal position
7. Tee weld in horizontal position
8. Outside corner weld in horizontal position
9. Butt weld in vertical position
10. Lap weld in vertical position
11. Tee weld in vertical position
12. Outside corner weld in vertical position
13. Butt weld in overhead position
14. Lap weld in overhead position
15. Tee weld in overhead position
16. Outside corner weld in overhead position

Normal Hours of Instruction - 630 hours

5. This program has been in existence several years and has provided job specific training for several agencies, mainly CETA and now JTPA.

6. This project will serve out-of-work and economically disadvantaged individuals who can benefit from specific skill training.

7. This project will provide needed skill training for unemployed and underemployed individuals whose existing job skills are not adequate to match current job opportunities.

8, 9. Students are generally clients of Job Council of the Ozarks, JTPA SDA 8, and are referred by them to these programs. Other agencies "buy slots" into the program for their clients if enrollment of JTPA students is not affected. The Job Council of the Ozarks determine JTPA II-A eligibility for student participation. the Job council and the skill center provide data entry for MIS forms. Students must be 18 years of age or older when they complete the program to be eligible. No services are provided to 14 and 15 year olds.

10. Certain student data such as attendance, completions, performance, etc. is furnished to SDA-8 for their use in determining success of the project.

11. See attachment A.

12. See item 4 for relationship of skill training to Adult Basic Education. In addition to Adult Basic Education support while students are in skill training, certain students may be referred to full-time Adult Basic Education until basic skills are brought up to levels needed to enter job training.

EXHIBIT A

CLERICAL

20 slots x 100% utilization = 20 slots
20 slots x 62.3% completion = 12 completions per cycle

TRANSPORTATION (DIESEL AND AUTO)

10 slots x 100% utilization = 10 slots
10 slots x 62.3% completion = 6 completions per cycle

WELDING

10 slots x 100% utilization = 10 slots
10 slots x 62.3% completion = 6 completions per cycle

Maximum slots 40

100% utilization 40

Completion per cycle 24

Minimum utilization 40

RESULTS EXPECTED

The Skill Center will receive payment for the maximum slots available at any one time. More participants will be enrolled and the cost per slot will decrease to less than $5,650 as participants complete their 18-week cycle.

TRAINING PAYMENT SCHEDULE

$226,000 ÷ 40 SLOTS = $5,650

Payment will be made for the first 25 adults and first 15 youth. The skill center will submit claims for payment monthly.

A completer is defined as an enrollee who has fulfilled one or more of the following criteria:

1. Has completed all units of instruction and attended the full time allotted to the program (18 weeks).

2. Has completed all units of instruction in less than the full time allotted for the program.

3. Has completed a significant* portion of instruction and leaves the program to enter unsubsidized employment.

The utilization and completion rates are dependent on intake procedure and general economic conditions. These factors are outside of the general influence of the Skill Center. Should conditions develop that create extended enrollment or completion problems, the contract will be subject to renegotiation.

GUARANTEE OF SLOTS

Should utilization in an instructional area fall below seventy-five percent (75%), for a period of three consecutive weeks, it shall be the prerogative of the Center to accept other enrollments on a "buy-in" basis. Acceptance of buy-in students will not in any way exclude administrative entity students up to the maximum stated in this agreement (20 Office Occupations, 10 Welding, 10 Transportation Mechanics). Specifics of Buy-In enrollment shall be determined by the Skill Center.

*Significant must be agreed upon by Contractor and the Administrative Entity.

SPRINGFIELD PUBLIC SCHOOL DISTRICT R-12

Graff Extension Skill Center

present contract

Instructor Appointment

This is to certify the appointment of _____

as Instructor in JTPA Office Occupations

Beginning July 1, 1987 Ending June 30, 1988

Day(s) 260 paid days Time _____ Total Hours 1820

under the following Terms and Conditions:

1. Remuneration $13.32 per hour (12 monthly payments of $2,020.20)
2. The instructor will perform the duties assigned in a professional manner.
3. The instructor will meet the certification requirements of the Missouri Department of Elementary and Secondary Education.
4. The instructor will x, will not ____ participate in the Missouri Teachers Retirement System.
5. The instructor will ____, will not x participate in the Missouri Non Teacher Retirement System.
6. The instructor will ____, will not x participate in FICA (Social Security).
7. The instructor will x, will not ____ be eligible for district fringe benefits.
8. Continuation of this appointment is dependent upon the availability of state and federal funding and sufficient student participation to justify the expenditures.
9. The appointment is not official until all signatures have been affixed.
10. 15 days vacation; 21 sick days, none of which will carry over past June 30, 1988; Employee Health and Life Insurance.

_____ Assistant Director's Signature	7/1/87 Date	_____ Instructor's Signature	7/1/87 Date
_____ Director's Signature	_____ Date	_____ Instructor's Social Security No.	

Pay Record

	Amount		Amount
July	_____	January	_____
August	_____	February	_____
September	_____	March	_____
October	_____	April	_____
November	_____	May	_____
December	_____	June	_____

Copy 1 District Copy 2 Instructor APPENDIX B

CITIES, TOWNS AND VILLAGES
CITY ATTORNEY:
FOURTH CLASS CITIES:
SPECIAL COUNSEL:

Pursuant to Section 79.230, RSMo 1986, the board of aldermen of a fourth class city may not employ special counsel without approval of the mayor.

March 10, 1989

OPINION NO. 51-89

FILED
51

The Honorable Jim Murphy
Representative, District 95
9314 Cordoba Lane
Crestwood, Missouri 63126

Dear Representative Murphy:

This opinion is in response to your questions asking:

A. Can the Board of Aldermen in a fourth-class municipality appoint a special counsel without the Mayor's approval or recommendation?

B. Can such an appointment be made when there is no vacancy in the City Attorney's position and/or when there is no assistance needed or requested by the City Attorney?

Section 79.230, RSMo 1986, provides:

> 79.230. Appointive officers.-- The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner.

The Honorable Jim Murphy

A fourth class city possesses only the powers which are expressly granted or necessarily implied, and any doubt concerning the existence of power is resolved against the municipality. State ex rel. City of Blue Springs v. McWilliams, 74 S.W.2d 363, 364 (Mo. banc 1934). Furthermore, "[w]hen the Legislature has expressly provided a method or methods by which a power conferred upon a municipality shall be exercised, the municipality has no implied power to exercise it in another manner." Id. at 367.

Under Section 79.230, the mayor and board of aldermen of a fourth class city may employ special counsel. The statute requires both the mayor and the board of aldermen employ the special counsel by ordinance. Since Section 79.230 provides the only method for a fourth class city to employ special counsel, the power to employ special counsel may not be exercised in any other fashion. Therefore, the board of aldermen may not employ special counsel without approval of the mayor, even though they pass an ordinance employing special counsel over the mayor's veto.

Based upon the answer to question A and the facts you submitted in your opinion request, it is unnecessary to address question B.

CONCLUSION

It is the opinion of this office that pursuant to Section 79.230, RSMo 1986, the board of aldermen of a fourth class city may not employ special counsel without approval of the mayor.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

AIRPORTS:
CONDEMNATION:
EMINENT DOMAIN:

Land separated from an existing airport by a public road or highway and located in the same county as the county which created the airport authority is "adjacent to the existing airport" as that phrase is used in Section 305.307.2, RSMo 1986.

January 30, 1989

OPINION NO. 57-89

FILED
57

The Honorable Norman L. Merrell
Senator, District 18
State Capitol Building, Room 423
Jefferson City, Missouri 65101

Dear Senator Merrell:

This opinion is in response to your question asking:

> May the term "adjacent to the existing airport" be interpreted broadly enough to include land on both sides of Route 16 for construction of the Lewis County Airport?

Your office has informed us that the Lewis County Airport Authority is considering the acquisition of land on which to construct an airport. Your question pertains to the airport authority's exercise of the power of eminent domain once they have an existing airport.

The airport authority was established pursuant to the provisions of Sections 305.300 to 305.333, RSMo 1986. The airport authority's power of eminent domain is set forth in Section 305.307, RSMo 1986. When that section was originally enacted in 1985 (Laws of Missouri, 1985, S.B. Nos. 145 and 166, Section 3, pp. 742, 744-745), subsection 3 denied the power of eminent domain to the airport authority:

> "3. Nothing contained in this act shall be construed to grant power to the county or the authority to acquire land by condemnation."

Section 305.307 was amended in 1986 (Laws of Missouri, 1986, S.B. 550, pp. 835, 836-837) to delete subsection 3 and to change subsection 2 to provide the airport authority with the power to condemn land in certain circumstances. Such subsection now provides in part:

"2. The authority may exercise any of the following governmental powers, including the power of eminent domain within the county which created the authority, and all other powers necessary, incidental, convenient or desirable to carry out and effectuate the express powers. The power of eminent domain may be exercised only in the acquisition of lands adjacent to the existing airport. . . ."

With respect to the construction of statutes granting the power of eminent domain, the Missouri Supreme Court has stated:

> "Statutes granting the right of eminent domain are to be strictly construed. The rule is well settled in this state. The right is not to be implied or inferred from vague or doubtful language but must be clearly given in express terms or by necessary implication. . . . In applying the rule, statutes granting the power to take private property for public use are strictly construed against those who seek to avail themselves of the benefit of such statutes and the power is not to be extended beyond the plain provisions of the statute relied upon. . . . On the other hand, 'while eminent domain statutes are to be strictly construed so far as the power to condemn is concerned, yet they are not to be construed so as to defeat the evident purpose of the Legislature.' State ex rel. Siegel v. Grimm, 314 Mo. 242, 284 S.W. 490, 493; 29 C.J.S., Eminent Domain, Section 22, p. 806. Further, the doctrine of strict construction does not exclude a reasonable and sound construction of the statute under consideration. . . ." [Citations omitted.] State ex rel. Missouri Water Company v. Bostian, 365 Mo. 228, 280 S.W.2d 663, 666 (banc 1955).

Applying these principles to Section 305.307.2, we conclude that the authority to exercise the power of eminent domain is limited by the location of the sought after land. The land to be condemned must be within Lewis County and must be "adjacent to" the existing airport. Thus we come to the question of whether land on the other side of the highway from the airport

comes within the description "adjacent to the existing airport". Since there is no existing airport or specific proposed site yet, we will assume that the land to be condemned is opposite the airport; that is, it would be contiguous or touching some part of the airport boundaries if it were not for the highway running between them.

The word "adjacent" has been interpreted by Missouri courts in a variety of contexts but not in regard to Section 305.307 or any other statute describing the scope of an entity's power to condemn land. The precise meaning of "adjacent" must be determined principally by the context in which it is used and in light of the facts of each particular case or by the subject matter to which it applies. It must be given its plain and ordinary meaning unless that meaning is inconsistent with the manifest intention of the statutory provision. City of St. Ann v. Spanos, 490 S.W.2d 653, 656 (Mo.App. 1973). When the term "adjacent" was used in jury instructions concerning a dispute over the ownership of accreted land, one Missouri court held that it did not necessarily mean contiguous but could include lands which lie close to each other but whose boundaries do not necessarily touch. Hauber v. Gentry, 215 S.W.2d 754, 758 (Mo. 1948).

When used in the context of a statute describing what land could be annexed by a municipal corporation, Section 79.020, RSMo 1969 (". . . shall have power to extend the limits of the city over territory adjacent thereto . . . ."), the Missouri Court of Appeals held that the term adjacent would be construed more narrowly because of the need to have annexation result in unbroken areas which can function effectively as a unit rather than in several small unconnected areas which could have problems in providing municipal services. City of St. Ann v. Spanos, supra, at 656. Although the City of St. Ann case did not involve land separated by a road but rather separated by unannexed private property, the court's opinion indicated that the term adjacent, even when construed narrowly, would not preclude land on the other side of a road from being considered within the meaning of that term in relation to the annexing municipality.

> "Webster's Third New International Dictionary defines adjacent as follows:
>
> > '[R]elatively near and having nothing of the same kind intervening: having a common border * * * immediately preceding or following with nothing of the same kind intervening * * * Applied

to things of the same type, it indicates either side-by-side proximity or lack of anything of the same nature intervening * * *.' (Emphasis added.)

While this and other definitions of adjacent include the word near, it is important to note that the word near is qualified by the phrase 'having nothing of the same kind intervening.' Thus, two buildings may be adjacent though separated by a walkway; two areas of land may be adjacent though separated by a stream or a road. But two areas of land are not adjacent when they are separated by a third area of land. This is the plain and ordinary meaning of adjacent and produces the most lucid and logical construction of Section 79.020.

"We believe that the term adjacent in Section 79.020 clearly means that territory to be annexed must be either abutting and touching the annexing municipality or not have territory of the same kind intervening between it and the annexing municipality." [Emphasis in original opinion.] City of St. Ann v. Spanos, supra at 656.

Based on the authorities cited above, we conclude that land on the other side of the highway opposite the airport is "adjacent" to the airport. The two areas of land are separated only by the highway running between them.

CONCLUSION

It is the opinion of this office that land separated from an existing airport by a public road or highway and located in the same county as the county which created the airport authority is "adjacent to the existing airport" as that phrase is used in Section 305.307.2, RSMo 1986.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

INVESTMENTS:
PUBLIC SCHOOL
RETIREMENT SYSTEM:

The Public School Retirement System of Missouri is authorized by Section 169.040.2(9), RSMo 1986, to engage in an investment procedure known as "securities lending."

April 4, 1989

OPINION NO. 59-89

FILED
59

David W. Mustoe, Ed.D.
Executive Secretary
The Public School Retirement
System of Missouri
Post Office Box 268
Jefferson City, MO 65102

Dear Dr. Mustoe:

This opinion is in response to your question asking:

> Does section 169.040.2 RSMo under which The Public School Retirement System of Missouri operates permit an investment procedure known as "securities lending", in which the retirement system would lend its securities to selected firms of its choice in the investment industry, in return for collateral in the form of either cash or securities equivalent in market value to more than the market value of the loaned securities at the time of the loan, with provision for the periodic adjustment of such collateral in relation to subsequent changes in market value in the securities loaned?

Your opinion request describes securities lending as follows:

> Investment houses frequently trade in securities which they do not physically possess at the time of trade. In order to close sales and deliver the securities, those houses "borrow" the securities from other owners who do not wish to sell the securities, later replacing them with like

> securities purchased from other sources. During the period that the borrowed security is not in the possession of the lender-owner, the borrower pledges to the lender in either cash or negotiable securities collateral of like market value, and adjusts the collateral as changes in market value occur. The lender then receives income from earnings on the collateral during the time the securities are borrowed, in addition to that being earned in the interim on the securities loaned which continues to accrue to the lender. Thus, the lender receives income not only from the original security loaned, but also on the collateral pledged to secure the security loaned.

The statutory provision applicable to the investment of funds of The Public School Retirement System of Missouri, Section 169.040.2, RSMo 1986, provides:

> 169.040. Funds of retirement system--how invested--custodian selected by the board--manner of making payment to be authorized by the board.
>
> * * *
>
> 2. The board shall invest all funds under its control which are in excess of a safe operating balance. The funds shall be invested only in the following types of investments:
>
> (1) Bonds or other obligations of the Unites States;
>
> (2) Bonds guaranteed by the United States;
>
> (3) Tenant-purchase loans which are secured by fully insured mortgages as provided for in the act of Congress known as the "Farmers Home Administration Act of 1946" as amended (7 U.S.C.A. § 1001 et seq.);

> (4) Bonds or notes secured by mortgages or deeds of trust guaranteed or insured by the Federal Housing Administrator, or debentures issued by such administrator, under the terms of an act of Congress of the United States of June 27, 1934, entitled the "National Housing Act" as heretofore or hereafter amended (12 U.S.C.A. § 1701 et seq.);
>
> (5) Bonds of the state of Missouri;
>
> (6) Bonds of a city, county or school district of the state of Missouri;
>
> (7) Accounts of any savings and loan association chartered by the United States of America or any state which are insured by the Federal Savings and Loan Insurance Corporation;
>
> (8) Any investments as permitted by laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri;
>
> (9) Any other investment which a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims. [Emphasis added.]

Subsection 2(9) was added to Section 169.040 in 1984 by House Committee Substitute for Senate Bill No. 407, 82nd General Assembly, Second Regular Session (Laws of Missouri, 1984, page 449).

Referring again to the statement of facts provided with your opinion request, you state:

> There does not appear to be any substantial risk involved in securities lending for the lender, as long as the lending is done judiciously and selectively under adequate collateral arrangements. Securities lending has been conducted

> within the investment industry for a number of years, and no reported loss caused by securities lending has yet been incurred by a lender.

Since the system of securities lending calls for collateral, either in the form of cash or negotiable securites, delivered to the lender of equal or greater value than the securities loaned, there is little possibility of loss to the lender. There is a definite gain of income to the lender, The Public School Retirement System of Missouri. This appears to be a completely secured transaction which conforms to the "prudent person" standard of Section 169.040.2(9). The "prudent man rule" is defined in Withers v. Teachers' Retirement System of City of New York, 447 F.Supp. 1248, 1254 (1978) as follows:

> . . . The classic statement of the "prudent man rule" in New York is that "the trustee is bound to employ such diligence and such prudence in the care and management [of the fund], as, in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs." King v. Talbot, 40 N.Y. 76, 85-86 (N.Y. Ct. of Appeals 1869). . . .

Enclosed herein is a copy of Missouri Attorney General Opinion No. 7, Hackwood, 1982; a copy of Missouri Attorney General Opinion No. 92, Bierdeman-Fike, 1980; and a copy of Missouri Attorney General Opinion No. 39, Hemphill, 1961. These opinions discuss the prudent man rule as it applies to the Missouri State Employees' Retirement System. Because "securites lending" such as presented in your opinion request conforms to the prudent person standard of Section 169.040.2(9), we conclude The Public School Retirement System of Missouri is authorized to engage in securities lending.

In Missouri Attorney General Opinion No. 10, Black, 1978, this office concluded The Public School Retirement System of Missouri was not allowed to engage in securities lending. This opinion was prior to the 1984 amendment to Section 169.040 which added subsection 2(9). Because of the 1984 amendment to Section 169.040, we are withdrawing Opinion No. 10, Black, 1978.

CONCLUSION

It is the opinion of this office that The Public School Retirement System of Missouri is authorized by Section

David W. Mustoe, Ed.D.

169.040.2(9), RSMo 1986, to engage in an investment procedure known as "securities lending."

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:
Opinion No. 7, Hackwood, 1982
Opinion No. 92, Bierdeman-Fike, 1980
Opinion No. 39, Hemphill, 1961

COUNTIES:
COUNTY SALES TAX:
TAXATION - COUNTY SALES TAX:

Harrison County can increase the sales tax authorized by Section 67.547, RSMo Supp. 1988, from one-fourth of one percent to one-half of one percent if authorized by a majority vote of the governing body and approved by the majority of the voters casting a vote on the proposal when submitted at a county or state general, primary or special election.

March 22, 1989

OPINION NO. 61-89

FILED
61

Randall D. Thompson
Harrison County Prosecuting Attorney
Post Office Box 87
Bethany, MO 64424

Dear Mr. Thompson:

This opinion is in response to your question asking:

> Can Harrison County impose by order of the County Commission an additional 1/4 of one percent county sales tax on all retail sales made within Harrison County under the provisions of Section 67.547 if there is already in place a 1/4 of one percent sales tax ordered by the County Commission under Section 67.547, and approved by the voters?
>
> In other words can the county enact more than one sales tax under 67.547 if the total aggregate amount of tax under 67.547 does not exceed 1/2 of one percent?

Section 67.547, RSMo Supp. 1988, allows a county to impose a county sales tax in addition to any and all other sales tax allowed by law. The tax may be imposed at a rate of one-fourth of one percent, three-eights of one percent, or one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within the county adopting such tax. Section 67.547.3, RSMo Supp. 1988. The tax must be authorized by a majority vote of the governing body of the county, but it does not become effective unless submitted to the voters of the county at a county or state general, primary or special election, and approved by a majority of the votes cast. Section 67.547.1, RSMo Supp. 1988.

Randall D. Thompson

In your opinion request, you state the voters in Harrison County approved a one-fourth of one percent sales tax under Section 67.547 on April 5, 1988. The question to be resolved is whether that tax can be increased by an additional one-fourth of one percent to one-half of one percent under the terms of the statute. The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986). Section 67.547, RSMo Supp. 1988, permits a maximum levy of one-half of one percent for this particular sales tax. There is nothing in the statute which would prevent the county from raising its current levy to one-half of one percent. However, under the specific terms of the statute, the increase would have to be authorized by a majority vote of the governing body and approved by the majority of the voters casting a vote on the proposal when submitted at a county or state general, primary or special election.

CONCLUSION

It is the opinion of this office that Harrison County can increase the sales tax authorized by Section 67.547, RSMo Supp. 1988, from one-fourth of one percent to one-half of one percent if authorized by a majority vote of the governing body and approved by the majority of the voters casting a vote on the proposal when submitted at a county or state general, primary or special election.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

COUNTIES:
COUNTY INSURANCE:
COUNTY OFFICIALS:
COUNTY SURVEYOR:
HEALTH INSURANCE:
INSURANCE:

A county which provides health insurance to some of its elected officials is not required to provide health insurance to the county surveyor.

April 5, 1989

OPINION NO. 62-89

FILED
62

The Honorable Danny Staples
Senator, District 20
State Capitol Building, Room 418
Jefferson City, Missouri 65101

Dear Senator Staples:

This opinion is in response to your question asking:

> If a county provides health insurance to any of its elected officials, does the county have to provide health insurance to all the elected officials of the county?

Your opinion request states that the question arises because in many instances county surveyors are omitted from the coverage of the insurance program. Your opinion request refers to Section 67.150, RSMo 1986.[1]

Section 67.150, RSMo 1986, provides:

> 67.150. Insurance for elected officials and employees, political subdivision may contribute--contracting procedure.--1. The governing body of any political subdivision may utilize the revenues and other available funds of the subdivision, as a part of the compensation of the elected officials and employees of the subdivision, to contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or part of hospitalization or medical expenses, life insurance or similar benefits for the subdivision's elected officials and employees.
>
> 2. No contract shall be entered into by the governing body of the political

> subdivision to purchase any insurance policy or policies pursuant to the terms of this section unless the contract is submitted to competitive bidding at least every three years and the contract is awarded to the lowest and best bidder.

From the use of the word "may," it is apparent that it is discretionary with the county commission as to whether the county will exercise the authority granted in the statute to obtain health insurance for the county officials and employees. "It has long been the rule that the word 'may' in a statute, unless the contrary is otherwise indicated therein, is generally held to be permissive, not mandatory." Bloom v. Missouri Board for Architects, Professional Engineers and Land Surveyors, 474 S.W.2d 861, 864 (St.L.Ct.App. 1971).

There is nothing in the language of Section 67.150 which addresses the question of whether the county commission is authorized to provide insurance coverage to some officials but not others. An examination of the constitution and statutes of Missouri reveals no provision which requires all county officials to be provided with health insurance. In fact, distinctions between employees of political subdivisions in regard to the provision of compensation have been upheld. If the classification is "based on reason, even a poor one, and treats all persons similarly situated alike, there is no constitutional violation . . . . And classifications according to occupations are reasonable and proper." [Citations omitted.] State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W.2d 290, 298 (Mo. 1975); accord, Elam v. Waynesville R-VI School District of Pulaski County, 676 S.W.2d 880 (Mo.App. 1984).

According to these principles of law, whether it is legally permissible to classify a particular county official for health insurance purposes differently than the other county officials depends on the particular facts in each instance. County surveyors differ from most other county officials in that the county surveyor has no statutory compensation. Section 60.100, RSMo 1986, provides:

> 60.100. May charge for services (second, third, and fourth class counties).--In counties of the second, third or fourth class, the county surveyor may charge for his services such a sum as may be agreed upon by such surveyor and the person employing him. For that sum, the

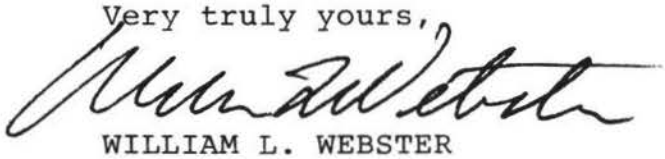
> surveyor shall employ and pay for the services of the necessary chainmen, rodmen and markers. For that sum, the surveyor shall furnish to the person employing him a plat of the survey made by him, and shall also record the plat as provided by law.

See also Section 138.020, RSMo Supp. 1988. Because of the differences between county surveyors and other county officials, we conclude that a county commission is not required to provide health insurance to the county surveyor even if health insurance is provided to other county officials.

CONCLUSION

It is the opinion of this office that a county which provides health insurance to some of its elected officials is not required to provide health insurance to the county surveyor.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

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1. Section 49.278, RSMo 1986, provides:

> 49.278. Governing body may provide insurance for county employees, procedure.--1. The county governing body in all counties may contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or a part of hospitalization or medical expenses, life insurance, or similar benefits for elected officials and their employees, and to appropriate and utilize its revenues and other available funds for these purposes.
>
> 2. No contract shall be entered into by the county to purchase any insurance policy or policies pursuant to the terms of this

> section unless such contract shall have been submitted to competitive bidding and such contract be awarded to the lowest and best bidder.

Because of the similarities between Section 67.150 and Section 49.278, it is not necessary to resolve which section applies in order to answer the question posed.

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 3, 1989

OPINION LETTER NO. 64-89

FILED
64

The Honorable Raymond W. "Bill" Hand
Representative, District 90
State Capitol Building, Room 101-F
Jefferson City, Missouri 65101

Dear Representative Hand:

This opinion letter is in response to your question asking:

> Does Section 301.227 RSMo. require that the insurer of a vehicle, deemed by them to be a "total loss", have to obtain the title to the vehicle from the insured, who elects to keep the vehicle, even though it is deemed by the insurer a "total loss" and procure a salvage title under this section of law before transferring the title back to the insured?

A copy of Section 301.227, RSMo 1986, is attached hereto as Appendix A.[1] This section concerns, "[w]henever a vehicle is sold for salvage, dismantling or rebuilding . . . ." (Emphasis added.) Section 301.227.1.

In the situation about which you are concerned, the owner of a vehicle which has been deemed a "total loss" retains the vehicle. Rather than transferring ownership of the vehicle, which has been deemed a total loss, to the insurance company, the owner chooses to retain the vehicle and accepts as a settlement the amount owed by the insurance company less the salvage value. Because the owner has chosen to retain the vehicle, the amount paid by the insurance company to the owner is reduced by the salvage value.

The statute applies whenever a vehicle is "sold" for salvage, dismantling or rebuilding. The word "sell" has been defined by the Missouri courts as follows:

> The ordinary meaning of the word "sell" as stated in Webster's New International Dictionary, 2nd Ed., Unabridged, is: "To sell is to transfer to another for a price, usually to be paid in money." Dimick v. Noonan, 242 S.W.2d 599, 602 (Mo. App. 1951).

In the situation about which you are concerned, the vehicle has been retained by the owner. There is no transfer to another of the vehicle. The amount paid by the insurance company to the owner has simply been reduced by the salvage value. Since there is no transfer by the owner, the vehicle has not been "sold" and therefore such section does not require the insurance company to obtain the title to the vehicle from the insured.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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1. Section 301.227, RSMo 1986 was amended by Senate Committee Substitute for House Committee Substitute for House Bill No. 1581, 84th General Assembly, Second Regular Session (1988), effective July 1, 1989. We presume your question relates to Section 301.227, RSMo 1986.

APPENDIX A

*** 301.227. Salvage certificate of title mandatory or optional, when—issuance, fee—junking certificate issued or rescended, when.—** 1. Whenever a vehicle is sold for salvage, dismantling or rebuilding, the purchaser must forward to the director of revenue within ten days the certificate of ownership or salvage certificate of title and the proper application and fee of seven dollars and fifty cents, and the director shall issue a negotiable salvage certificate of title to the purchaser of the salvaged vehicle. On vehicles not more than seven years old, it shall be mandatory that the purchaser apply for a salvage title, but on vehicles over seven years old, application for a salvage title shall be optional on the part of the purchaser. Whenever a vehicle is sold for destruction and a salvage certificate of title, junking certificate, or certificate of ownership exists, the seller, if licensed under sections 301.217 to 301.221, shall forward the certificate to the director of revenue within ten days, with the notation of the date sold for destruction and the name of the purchaser clearly shown on the face of the certificate.

2. Whenever a vehicle is sold for parts, scrapping, or junking, and not for rebuilding or reconstruction, the purchaser may forward to the director of revenue the salvage certificate of title or certificate of ownership and the director shall issue a negotiable junking certificate to the purchaser of the vehicle.

3. Upon receipt of a properly completed application for a junking certificate, the director of revenue shall issue to the applicant a junking certificate which shall authorize the holder to possess, transport, or, by assignment, transfer ownership in such parts, scrap or junk, and a certificate of title shall not again be issued for such vehicle; except that, the initial purchaser shall, within ninety days, be allowed to rescind his application for a junking certificate by surrendering the junking certificate and apply for a salvage certificate of title in his name. The seller of a vehicle for which a junking certificate has been applied for or issued shall disclose such fact in writing to any prospective buyers before sale of such vehicle, otherwise the sale shall be voidable at the option of the buyer.

4. No scrap metal operator shall acquire or purchase a motor vehicle or parts thereof without, at the time of such acquisition, receiving the original certificate of title or salvage certificate of title or junking certificate from the seller of the vehicle or parts, unless the seller is a licensee under sections 301.219 to 301.221.

5. All titles and certificates required to be received by scrap metal operators from nonlicensees shall be forwarded by the operator to the director of revenue within ten days of the receipt of the vehicle or parts.

6. The scrap metal operator shall keep a record, for three years, of the seller's name and address, the salvage business license number of the licensee, date of purchase, and any vehicle or parts identification numbers open for inspection as provided in section 301.225.

7. Notwithstanding any other provision of this section, a dealer as defined in section 301.250 and licensed under the provisions of section 301.253 may negotiate one reassignment of a salvage certificate of title on the back thereof.

8. Notwithstanding the provisions of subsection 1 of this section, an insurance company which settles a claim for a stolen vehicle, as herein defined in this act, ** shall be issued a negotiable salvage certificate of title without the payment of any fee upon proper application within thirty days after settlement of the claim for such stolen vehicle.

(L. 1979 H.B. 78 § 9, A.L. 1983 H.B. 149, 286, 374, 401 & 517, A.L. 1984 S.B. 648 Revision, H.B. 1045, A.L. 1986 H.B. 1367 & 1573)

* Both versions of this section as they appear in RSMo Supp. 1984 were repealed when this section was reenacted.

** "This act" contained 14 sections. Interested persons should see H.B. 1367 & 1573, 1986 Disposition of Sections Table.

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

August 1, 1989

OPINION LETTER NO. 68-89

The Honorable Ted House
Representative, District 20
State Capitol Building, Room 115G
Jefferson City, Missouri 65101

Dear Representative House:

This opinion letter is in response to your question asking:

> Can a municipality annex territory of an existing port authority, duly established under the provisions of Chapter 68, RSMo, and assuming it can annex such territory, what effect does the annexation have on the port authority?

You indicate the port authority about which you are concerned is the St. Charles County Port Authority, and the annexations about which you are concerned were by the City of St. Peters, a fourth class city, and the City of St. Charles, a constitutional charter city. Discussions with your office indicate that the second part of your question pertains to whether such annexations will prevent the port authority from exercising its regular scope of control over the territory within its boundaries.

The territory which may be annexed by a fourth class or a constitutional charter city is described in Missouri statutes as "unincorporated areas". Sections 71.012 and 71.014, RSMo 1986. The term "unincorporated" in those statutes means the area which is outside the boundaries of incorporated cities. City of Olivette v. Graeler, 338 S.W.2d 827, 834 (Mo. 1960), overruled on other grounds, City of Town and Country v. St. Louis County, 657 S.W.2d 598, 606 (Mo. banc 1983) but specifically reaffirming the City of Olivette holding regarding the definition of unincorporated land. The territory which special purpose districts occupy does not ipso facto become an

incorporated area within the meaning of the annexation statutes and, therefore, cannot be excluded from annexation for that reason. City of Olivette v. Graeler, supra at 836. This holding comports with the holdings in other jurisdictions that annexation by a city is not prohibited simply because the area to be annexed is within the boundaries of a special purpose district. City of Pelly v. Harris County Water Control & Improvement Dist. No. 7, 198 S.W.2d 450, 452-453 (Tx. 1946); Annexation to the City of Anchorage, Alaska, of the Rogers Park Area, 128 F.Supp. 717, 718 (D.C. Alaska 1954); In Re Annexation to City of Anchorage, Alaska of Eastchester Area Number Three, 129 F.Supp. 551, 554 (D.C. Alaska 1955); City of Bellevue v. Eastern Sarpy County Suburban Fire Protection District, 143 N.W.2d 62, 63-64 (Nebr. 1966); Tovey v. City of Charleston, 117 S.E.2d 872, 875 (S.Car. 1961); Fairfax County v. City of Alexandria, 68 S.E.2d 101, 106 (Va. 1951); State ex rel. East Lenoir Sanitary District v. City of Lenoir, 105 S.E.2d 411, 414-415 (N.Car. 1958); McQuillin Mun. Corp., Volume 2, Section 7.22 (3rd Ed.). Therefore, we conclude that a city may annex territory within the boundaries of an existing port authority.

As for the question of what effect annexation has on the ability of a port authority to carry out its statutory powers and functions, it is significant that Section 68.015.1, RSMo 1986, contemplates that port authorities may exist within the boundaries of a city.

> "1. The legislative body, or county commission, of each county or city creating a port authority or any port authority created within said city pursuant to section 68.010 hereof shall designate what areas within such county or city shall comprise one or more port districts, subject to the limitation that any area designated as within a port district shall be or could be reasonably connected to the business of a port. . . ." Subsection 1 of Section 68.015, RSMo 1986.

It is logical to infer that the statutory powers and functions of port authorities set forth in Chapter 68, RSMo, were set forth in contemplation of them being exercised within the boundaries of a city.

In regard to a special purpose district which did not previously exist within a city's boundaries having part of its territory annexed, the general rule in Missouri is that, without specific constitutional or statutory provisions to the contrary,

such annexation does not "take away any of these [statutory] powers, and did not take this territory out of the [levee] District or change its boundaries or its authority over all of its original area." State ex rel. Collins v. Rooney, 361 Mo. 389, 235 S.W.2d 260, 262 (banc 1950) (annexation of part of levee district by Kansas City did not prevent the district from pursuing its reclamation plan including condemnation of private property and the making of assessments within the annexed territory). In St. Louis County Library District v. Hopkins, 375 S.W.2d 71 (Mo. 1964), the Missouri Supreme Court upheld the library district's power to continue levying and collecting its taxes on property within those portions of its territory annexed by the City of Florissant despite the fact that the City of Florissant had a tax supported municipal library of its own.

However, disputes about which of two overlapping governmental entities, such as a city and a special purpose district, is going to be superior to the other in the exercise of a particular power or function involve a fairly complex legal analysis the outcome of which is dependant on the facts unique to each individual case. See, for example, City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31 (Mo.App. 1979) and discussion of Missouri cases therein; City of St. Louis v. City of Bridgeton, 705 S.W.2d 524 (Mo.App. 1985); State ex rel. Maryland Heights Fire Protection District v. Campbell, 736 S.W.2d 383 (Mo. banc 1987); Board of Education of City of St. Louis v. City of St. Louis, 267 Mo. 356, 184 S.W. 975 (1916); Kansas City v. School District of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947); Bredeck v. Board of Education of City of St. Louis, 213 S.W.2d 889 (St.L. Ct.App. 1948); Smith v. Board of Education of City of St. Louis, 359 Mo. 264, 221 S.W.2d 203 (banc 1949). Since there is no specific fact situation which has been presented to this office implicating any specific power or function, we cannot give specific guidance as to a particular power or function.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 3, 1989

OPINION LETTER NO. 71-89

FILED
71

The Honorable Joe McCracken
Representative, District 139
State Capitol Building, Room 114
Jefferson City, Missouri 65101

and

The Honorable Ken Legan
Representative, District 141
State Capitol Building, Room 201
Jefferson City, Missouri 65101

Dear Representative McCracken and Representative Legan:

You have each asked that this office opine on the sales tax adopted by the voters of Polk County in August of 1988. You asked if the sales tax is a valid tax and if the funds collected pursuant to the tax are to be expended under Section 67.505, RSMo, or Section 67.582, RSMo.

Based on the information you enclosed with your opinion request, we understand that the minutes of the county commission in June of 1988 identified the proposed sales tax as the county law enforcement sales tax authorized by Section 67.582, RSMo Supp. 1988. The published notice regarding the election for the proposed sales tax apparently identified the sales tax as being authorized by Section 67.505, RSMo 1986. Section 67.505 relates to the County Sales Tax Act which is commonly referred to as the general county sales tax. The language of the ballot at the August 1988 election follows the suggested language in Section 67.582 by stating the tax is for the purpose of providing law enforcement services for the county. The suggested language in Section 67.582 is substantially different than the suggested language in Section 67.505. The documents filed with the Missouri Department of Revenue by the county indicate the tax is imposed pursuant to Section 67.582, the county law enforcement sales tax. Based on the information you have provided, it appears that the only reference to Section 67.505 and the County Sales Tax Act of

which that section is a part is the reference in the published notice of election identifying the authorizing statute as Section 67.505.

It appears your questions relate to whether the one, apparently erroneous, reference to Section 67.505 in the published notice of election invalidates the election or causes the sales tax to be expended pursuant to Section 67.505. Under Section 115.553, RSMo 1986, the result of an election on a question may be contested by one or more registered voters from the area in which the election was held and the election authority responsible for issuing the statement setting forth the result of the election shall be considered the contestee. However, such election contest, under Section 115.577, RSMo 1986, must be filed not later than thirty days after the official announcement of the election result by the election authority. See Clark v. City of Trenton, 591 S.W.2d 257 (Mo. App. 1979) and Beatty v. Metropolitan St. Louis Sewer District, 700 S.W.2d 831 (Mo. banc 1985). As stated in Clark v. City of Trenton, supra at 259, the Comprehensive Election Act of 1977, was intended to give finality and conclusiveness to elections and, to that end, accelerated judicial procedures were incorporated to govern election contests. If no such election contest was filed within thirty days of the official announcement of the election result, the result of such election became final notwithstanding any possible arguments with respect to the published notice.

Because the time has expired for the election to be contested, the error in the published notice has no effect on the validity of the tax authorized at the August 1988 election. All other documents of which you have provided us copies indicate that the tax authorized is the law enforcement sales tax pursuant to Section 67.582. Therefore, the sales tax is to be expended pursuant to Section 67.582 as provided in all of the other documents relating to the election and the imposition of the tax.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ASSESSOR:
COUNTIES:
COUNTY EMPLOYEES:
NEPOTISM:

(1) A county assessor who retains as an employee a relative within the fourth degree, by consanguinity or affinity, which relative was employed by the prior county assessor, does not violate Article VII, Section 6 of the Missouri Constitution, the nepotism provision, and (2) pay increases or increases in other benefits incidental to the original employment do not result in the county assessor violating the nepotism provision.

March 27, 1989

OPINION NO. 73-89

Jim Elliott
Maries County Prosecuting Attorney
Post Office Box 212
Vienna, Missouri 65582

Dear Mr. Elliott:

This opinion is in response to your questions asking:

> Whether or not an elected county officeholder, to-wit, county assessor, is guilty of nepotism under Article VII, Section 6 of the Missouri Constitution if at the time of her election and during part or all of her term of office has a relative within the fourth degree of consanguinity or affinity working as an assistant in the assessor's office, which relative was employed by the outgoing county assessor prior to the time that the subject county assessor was elected to office.
>
> Would a pay increase, promotion, salary increase, or increase of any other benefits given to the relative after the subject county assessor took office have any effect on your opinion?

Article VII, Section 6 of the Missouri Constitution provides:

> Section 6. Penalty for nepotism. Any public officer or employee in this state who by virtue of his office or employment

> names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.

In Missouri Attorney General Opinion Letter No. 254, Hazel, 1975, a copy of which is enclosed, this office concluded that a member of the board of trustees of a third class county hospital was not guilty of nepotism if at the time of his election and during part or all of his term there was employed by the county hospital a relative within the fourth degree, by consanguinity or affinity, who was employed prior to the time that the board member was elected to office. The basis for this conclusion was that the board member did not participate in the hiring of the relative. In that opinion, this office further concluded that where the employee, who was hired before the board member came into office, received pay increases, such pay increases were merely incidental to the original employment which took place prior to the time the board member was elected to office. Therefore, the granting of pay increases would not violate the nepotism provision. The reasoning in Opinion Letter No. 254, Hazel, 1975, is applicable to the situation about which you are concerned.

Based on Opinion Letter No. 254, Hazel, 1975, we conclude that the newly-elected county assessor is not guilty of nepotism under Article VII, Section 6 of the Missouri Constitution if at the time of her election and during part or all of her term she has a relative within the fourth degree, by consanguinity or affinity, working as an assistant, which relative was employed by the outgoing county assessor prior to the time the newly-elected county assessor was elected to office. Consistent with our prior opinion, pay increases or increases in other benefits incidental to the original employment do not result in the newly-elected county assessor violating the nepotism provision. However, if the newly-elected county assessor were to appoint her relative to a distinctly different position, the nepotism provision of the Missouri Constitution would be violated.

CONCLUSION

It is the opinion of this office that (1) a county assessor who retains as an employee a relative within the fourth degree, by consanguinity or affinity, which relative was employed by the prior county assessor, does not violate Article VII, Section 6 of the Missouri Constitution, the nepotism provision, and (2) pay increases or increases in other benefits incidental to the

Jim Elliott

original employment do not result in the county assessor violating the nepotism provision.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion Letter No. 254, Hazel, 1975

CHAMBER OF COMMERCE:
CONSTITUTIONAL LAW:
COUNTIES:
COUNTY FUNDS:
GRANT OF PUBLIC MONIES:

A third-class county is not authorized to grant money without restriction to a private entity such as a chamber of commerce.

March 3, 1989

OPINION NO. 74-89

FILED
74

William Camm Seay
Dent County Prosecuting Attorney
P. O. Box 418
Salem, Missouri 65560

Dear Mr. Seay:

This opinion is in response to your question asking:

> Is it lawful for a third-class county to appropriate and disburse funds to an independent entity not a part of county government which is not a taxing entity, such as a chamber of commerce?

You have provided further information indicating that the Dent County Commission has been asked to appropriate without restriction $5,000 to the Salem Chamber of Commerce, a private entity. Although the appropriation would be unrestricted, there has been some discussion that the $5,000 would be used to develop tourism pamphlets regarding the local area.

Any authority which the county commission might have to make such a grant must be derived from statute.

> It is well settled that a county court is not the general agent of the county or of the state. Its powers are limited and defined by statute which constitutes its warranty of attorney. . . .
>
> A county like any other public corporation can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the

> corporation -- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. Browning-Ferris Industries of Kansas City, Inc. v. Dance, 671 S.W.2d 801, 808 (Mo.App. 1984).

We cannot find any statute which expressly or by necessary implication authorizes the county commission to grant money without restriction to the chamber of commerce.[1] In the absence of such statutory authorization, such appropriation is not permitted.

In addition to the lack of statutory authorization, there is a constitutional problem associated with such appropriation. Article VI, Section 23 of the Missouri Constitution provides:

> No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

Article VI, Section 25 of the Missouri Constitution (as amended in 1984) provides:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the surviving spouses and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services

> and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the surviving spouses and minor children of such deceased employees; and except also, any county, city or political corporation or subdivision may provide for the payment of periodic cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, provided such pension and retirement systems will remain actuarially sound.

The appropriation, since it is not in return for any goods, services or other consideration, is in the nature of a gift or grant. "The term 'grant,' as used in the cited constitutional sections [Article VI, Sections 23 and 25, Missouri Constitution] has been treated by the Supreme Court of Missouri as synonymous with 'give away.'" St. Charles City-County Library District v. St. Charles Library Building Corporation, 627 S.W.2d 64, 69 (Mo.App. 1981). The appropriation about which you are concerned would be in violation of Article VI, Sections 23 and 25 of the Missouri Constitution.

As a grant to a private entity, the proposed appropriation would violate these constitutional provisions no matter what incidental benefit to the public might result. In St. Louis Children's Hospital v. Conway, 582 S.W.2d 687 (Mo. banc 1979), the court held that the City of St. Louis violated these and other constitutional provisions when it gave land which it owned to a private hospital corporation to aid the hospital in building an addition.

> There is no question but what the people of the city of St. Louis and other areas greatly benefit from the services rendered by the Barnes Hospital Group and St. Louis Children's Hospital in particular; however, the hospital is, nevertheless, a private --not a public -- institution and the services rendered are essentially the same as any other hospital. And with all due respect for the special services rendered to children by

> the instant hospital, it must be observed that other private corporations also render benefits to the communities in which they are situated. But those benefits cannot be utilized to convert a private corporation or association into a public corporation for the purpose of allowing a municipal government to give its property away without, in effect, completely obliterating the prohibition against giving public property to private persons or associations as provided in our constitution.
>
> * * *
>
> It becomes readily apparent that a constitutional charter city, and perhaps other cities, has been granted almost pervasive power to control their public streets, including power to vacate a street or part thereof. Here, however, the city went through the motions of vacating a street and at the same time required the area to remain in use as a public street. The result, of course, is that the street is not vacated at all.
>
> The substance of the ordinance provides for a transfer by warranty deed of a real property interest and not the vacation of a street. At least a part of the property conveyed by the city was held in fee simple -- the area that was part of Forest Park. We do not know what interest -- fee or easement -- the city held in the remainder of the property. The gift of this real property by the city to a private institution cannot be approved in view of the prohibitions contained in art. 1, sec. 27, Mo.Const., which permits the disposition to be by 'sale', and art. 6, secs. 23 and 25, Mo.Const., which prohibits the giving away of public property to a private association or corporation. Id. at 690-691.

The conclusion that the grant to the chamber of commerce is not permitted is consistent with prior opinions of this office in which it was concluded that a county could not grant money to

a not-for-profit corporation whose purpose was the promotion of the orderly growth and welfare of a city, Attorney General Opinion No. 75, Riley, February 29, 1952; that a city could not allow a chamber of commerce to use space rent free in a municipally owned building, Attorney General Opinion No. 9, Antonio, September 27, 1979; and that a city could not grant money to private not-for-profit corporations, such as a senior citizens center, Attorney General Opinion Letter No. 88, Sharpe, March 3, 1981, and a day care center, Attorney General Opinion Letter No. 69, Marshall, February 11, 1974. A copy of each of these opinions is enclosed.

CONCLUSION

It is the opinion of this office that a third-class county is not authorized to grant money without restriction to a private entity such as a chamber of commerce.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:
Opinion No. 75, Riley, February 29, 1952
Opinion No. 9, Antonio, September 27, 1979
Opinion Letter No. 88, Sharpe, March 3, 1981
Opinion Letter No. 69, Marshall, February 11, 1974

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1. Both Section 67.303, RSMo Supp. 1988, and Section 349.012, RSMo 1986, authorize the county commission to appropriate money to promote and develop economic growth or commercial and industrial development within the county. However, the appropriation of money to private entities for these purposes must, by express terms of the statutes, be by contract.

Section 349.012, RSMo 1986, provides:

> The county commission, or other governing body, shall have the power to spend county funds to promote commercial and industrial development and, in order to achieve such promotion, to engage in any activities,

> either on its own or in conjunction and by contract with any not for profit organization, which it deems necessary to carry on such promotional work. [Emphasis added.]

Section 67.303, RSMo Supp. 1988, provides:

> 1. The county commission of any county may engage in activities designed for the purpose of promoting and developing economic growth within its county.
>
> 2. The county commission of any such county may contract with any political subdivision, firm, corporation, association, or person for the purposes of implementing the provisions of this section. [Emphasis added.]

DEPARTMENT OF PUBLIC SAFETY:
PEACE OFFICERS:
POLICE:
POLICE TRAINING:

(1) The "grandfather" provisions in Section 590.115, RSMo Supp. 1988, exempt certain peace officers and reserve officers from being certified, and the director of the Department of Public Safety may not issue a certificate to such officers unless the officers have completed the required training, (2) the director may establish training requirements for reserve officers who are exempt from certification, but voluntarily choose to seek certification, (3) under subsection 2 of Section 590.115 only peace officers who were working as a peace officer prior to December 31, 1978, and were working for the same department after August 15, 1988, as they were working for on August 13, 1988, are exempt from certification, and (4) reserve officers appointed after August 15, 1988, must receive the same training as peace officers in order to be certified.

September 26, 1989

OPINION NO. 76-89

The Honorable Marion Cairns
Representative, District 97
State Capitol Building, Room 101
Jefferson City, Missouri 65101

and

Richard C. Rice, Director
Department of Public Safety
P.O. Box 749
Jefferson City, Missouri 65102

Dear Representative Cairns and Director Rice:

Each of you has posed questions relating to the training and certification of peace officers or reserve officers. The question posed by Representative Cairns is as follows:

> Does the Director have the authority to deny certification to reserve officers appointed prior to August 15, 1988, by the City of Webster Groves not subsequently appointed as reserve officers by any different law enforcement agency when under the provisions of Section 590.115.3 RSMo training is not required?

The questions posed by Director Rice are as follows:

1. If peace officers appointed prior to December 31, 1978, or reserve officers appointed prior to August 15, 1988, apply for certification, can this department require that they satisfy the applicable basic training requirement for peace officers/reserve officers in order to become certified?

2. Does the director have the discretion of establishing a minimum training requirement for reserve officers appointed prior to August 15, 1988, who apply for certification?

3. Section 590.115.2, RSMo Supp. 1988, states training is recommended but not required of a peace officer who has been employed as a full-time peace officer and was appointed before December 31, 1978, unless and until any such officer is appointed as a peace officer after August 15, 1988, by a different law enforcement agency than the one to which he was appointed or by which he was employed on August 13, 1988. Section 590.115.3, RSMo Supp. 1988, states training is recommended but not required of a reserve officer who is appointed as a reserve officer prior to August 15, 1988, unless and until any such officer is appointed as a reserve officer after August 15, 1988, by a different law enforcement agency than the one to which he was appointed on August 13, 1988. Do the dates in question impact on the hiring and certification process of an officer employed on August 14-15, 1988?

Section 590.115, RSMo Supp. 1988, provides:

590.115. Noncertified officers training to be completed when-exception,

reserve officers training to be at option of political subdivision-prior training, what qualifies for certification.--1. Within one year from date of probationary appointment, the chief executive officer shall furnish to the director evidence that the noncertified officer has satisfactorily completed instruction in a course of training for peace officers in a certified training academy or is currently enrolled in a certified training program to be completed within the first year of employment.

2. Training specified in sections 590.100 to 590.180 is recommended but not required of a peace officer who has been employed as a full-time peace officer and was appointed before December 31, 1978, unless and until any such officer is appointed as a peace officer after August 15, 1988, by a different law enforcement agency than the one to which he was appointed or by which he was employed on August 13, 1988. Such officer must satisfactorily complete within one year from the date of this probationary appointment the training requirements for peace officers established by the director for each specific jurisdiction or be enrolled in such a certified training program to be completed within the first year of appointment.

3. Training specified in sections 590.100 to 590.180 is recommended but not required of a reserve officer who was appointed as a reserve officer prior to August 15, 1988, unless and until any such officer is appointed as a reserve officer after August 15, 1988, by a different law enforcement agency than the one to which he was appointed on August 13, 1988. Such a reserve officer and every reserve officer appointed after August 15, 1988, may, at the option of the political subdivision in which the officer is employed,

satisfactorily complete within one year from the date of his initial probationary appointment the training requirements for peace officers established by the director for each specific jurisdiction or be enrolled in such a certified training program to be completed within the first year of appointment.

4. Except as provided in subsections 1, 2, 3 and 5 of this section, in the event that a peace officer claims to have had prior training and experience, the chief executive officer shall furnish to the director evidence that the noncertified officer has satisfactorily completed instruction in a course of training for peace officers conducted by a law enforcement training academy or institute which is approved by the director as providing training equivalent to standards set for jurisdiction within this state. The training course satisfactorily completed by the noncertified officer shall meet the minimum training requirements of the jurisdiction in which he is appointed or is to be appointed as required under the provisions of sections 590.100 to 590.180.

5. The director may certify a chief executive officer, peace officer or reserve officer as qualified under sections 590.100 to 590.180, if the person's employer furnishes the director with evidence that the chief executive officer has training or experience equivalent to the standards set forth in subsection 1, 2, 3, or 4 of this section or is a graduate of the FBI National Academy or its equivalent as determined by the director, or holds a bachelor of science degree in criminal justice or a related field received from an accredited college or university or a doctor of jurisprudence degree received from a college or university approved by the American Bar Association.

> 6. Peace officers meeting the requirements in subsection 1, 2, 3, 4 or 5 of this section shall be certified by the director as having completed the training requirements under sections 590.100 to 590.180. (Emphasis added.)

The principle task of statutory construction is to seek to find and further the intent of the legislature. Centerre Bank of Crane v. Director of Revenue, 744 S.W.2d 754 (Mo. banc 1988). Legislative intent must be ascertained by examining the plain language of the statute viewed as a whole. Staley v. Missouri Director of Revenue, 623 S.W.2d 246 (Mo. banc 1981). Irrespective of what the legislature may have intended, we must look to the express language of the law to determine its meaning. State ex rel. DeGraffenreid v. Keet, 619 S.W.2d 873 (Mo.App. 1981). When the language of a statute is unambiguous, there is no room for construction since the legislature will be presumed to have said exactly what it intended. DePoortere v. Commercial Credit Corporation, 500 S.W.2d 724 (Mo.App. 1973).

It is clear that the legislature intended to "grandfather" certain peace officers and reserve officers from completing the mandatory training requirement of Chapter 590, RSMo. The question to resolve is whether these officers are exempt from certification or are exempt from the training.

The answer to this question can be found in subsection 6 of Section 590.115. That section states that officers "meeting the requirements . . . shall be certified by the director as having completed the training requirements under sections 590.100 to 590.180." Thus, the language permits the director to certify only those persons "having completed the training". When a statute expressly prescribes how a procedure is to be performed, it "includes in the power granted the negative that it cannot be otherwise done." State ex rel. State Highway Commission v. County of Camden, 394 S.W.2d 71, 77 (Mo.App. 1965). It would be contrary to the statute for the director to issue a certificate to anyone who has not actually completed the training.

Therefore, we conclude that the "grandfather" provisions of Chapter 590 exempt an officer from being certified. Exempt officers may chose to receive the training and then receive a certificate from the Department of Public Safety but cannot be required to be trained or certified. In answer to the question of Representative Cairns, the director does have the authority

to deny certification to the reserve officers in question who have not completed the required training. In answer to the first question of Director Rice, the department can require the officers in question to complete the training in order to become certified.

Having determined that grandfathered reserve and peace officers are exempt from mandatory certification, we now address the second question of Director Rice asking if the director may develop a program of training for exempt reserve officers who nevertheless voluntarily choose to seek certification. We understand your question relates to certain exempt reserve officers who desire training but not of the number of hours provided in the training program for nonexempt reserve officers. These exempt reserve officers would receive training of fewer hours and receive recognition, a certificate, for such limited training. The officers involved are from agencies located in a county of the first class having a charter form of government.

Section 590.105, RSMo Supp. 1988, states, in part: "The director shall establish the minimum number of hours of training and core curriculum." The only statutory limitation on the authority set forth in Section 590.105 is that the director may not require more than one thousand hours for state officers, more than six hundred hours for officers whose agencies are located in any county of the first class having a charter form of government or in any city not within a county, and more or less than one hundred and twenty hours for any other officer. The express mention of one limitation implies the exclusion of any other limitations. Harrison v. MFA Mutual Insurance Co., 607 S.W.2d 137, 146 (Mo. banc 1980). Under such section, the director is only limited in that the training shall not exceed six hundred hours for reserve officers in such county.

Therefore, we conclude that the director may establish training requirements for reserve officers who are exempt from certification but who choose to seek certification for such limited training. This certificate of limited training would not constitute a certificate under subsection 3 of Section 590.115 should the officer be appointed by a different law enforcement agency after August 15, 1988. This is because reserve officers hired by a different agency who wish to be certified must complete "the training requirements for peace officers."

The third question of Director Rice deals with peace officers and reserve officers who are hired between August 13, 1988, and August 16, 1988. With respect to peace officers, subsection 2 of Section 590.115 states that training "is recommended but not required of a peace officer who has been employed as a full-time peace officer and was appointed before December 31, 1978, unless and until any such officer is appointed as a peace officer after August 15, 1988, by a different law enforcement agency than the one to which he was appointed or by which he was employed on August 13, 1988." Under this subsection only one classification of peace officer is exempt, those who were working as a peace officer prior to December 31, 1978, and who were working for the same department after August 15, 1988, as they were working for on August 13, 1988. Any other officer must be certified, including officers who are hired by a new or different law enforcement agency on August 14 or 15, 1988. This is because those officers would be working for a different law enforcement agency after August 15, 1988, than the one they were working for on August 13, 1988.

With respect to reserve officers, under Missouri law no reserve officers must be certified. Subsection 3 of Section 590.115 states in part: "Such a reserve officer and <u>every reserve officer</u> appointed after August 15, 1988, <u>may</u>, at the option of the political subdivision in which the officer is employed, satisfactorily complete within one year from the date of his initial probationary appointment the training requirements for peace officers established by the director . . . ." (Emphasis added.) Certification and, thus, mandatory training is not required for any reserve police officer regardless of when appointed. The only reason for designating a date in the legislation is that the training for a reserve officer appointed after August 15, 1988, must be the same training as that received by a "regular" peace officer.

This interpretation is bolstered by the legislative history of this statute. Prior to the enactment of the present statute in 1988 (Conference Committee Substitute for Senate Committee Substitute for Senate Bill No. 532, 84th General Assembly, Second Regular Session), reserve officers could not be certified, even if they wished to be. This was because certification was limited to peace officers working more than thirty-two hours a week. Section 590.100(2), RSMo. 1978. Senate Bill No. 532 changes the law to allow, but not require, the certification of reserve officers regardless of the number of hours they work.

For these reasons, the dates impact upon the hiring and certification of reserve officers only because reserve officers hired after August 15, 1988, must receive the same training as any other peace officers to be certified while a reserve officer appointed prior to that date may receive different training to be certified as the director may establish.

CONCLUSION

It is the opinion of this office that: (1) the "grandfather" provisions in Section 590.115, RSMo Supp. 1988, exempt certain peace officers and reserve officers from being certified, and the director of the Department of Public Safety may not issue a certificate to such officers unless the officers have completed the required training, (2) the director may establish training requirements for reserve officers who are exempt from certification, but voluntarily choose to seek certification, (3) under subsection 2 of Section 590.115 only peace officers who were working as a peace officer prior to December 31, 1978, and were working for the same department after August 15, 1988, as they were working for on August 13, 1988, are exempt from certification, and (4) reserve officers appointed after August 15, 1988, must receive the same training as peace officers in order to be certified.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 20, 1989

OPINION LETTER NO. 79-89

FILED
79

Charles E. Kruse, Director
Missouri Department of Agriculture
Post Office Box 630
Jefferson City, Missouri 65102

Dear Director Kruse:

This opinion letter is in response to your questions asking:

> 1. Is the Missouri Agricultural and Small Business Development Authority (hereinafter referred to as the "Authority") authorized to enter into a special conservation reserve enhancement program with the United States, through the United States Department of Agriculture, in order to institute the special conservation reserve enhancement program on behalf of the State of Missouri?
>
> 2. Is the Authority authorized to enter into binding agreements whereby the Authority will succeed to the rights and obligations of the Conservation Reserve Program contracts executed by participating farmers?
>
> 3. Who is the proper person to sign, on behalf of the Authority, the agreement whereby the Authority will enter into the special conservation reserve enhancement program and the agreements whereby the Authority will succeed to the rights and obligations of the Conservation Reserve Program contracts signed by participating farmers?

The answer to your first question requires an examination of the federal law which provides for the establishment of

special conservation reserve programs. Section 322 of Public Law No. 100-387 (hereinafter "Section 322") provides:

> SEC. 322. CONSERVATION RESERVE ENHANCEMENT PROGRAMS.
>
> Effective beginning with the 1988 crop year, subsection (f) of section 1234 of the Food Security Act of 1985 (16 U.S.C. 3834(f) is amended by adding at the end thereof the following new paragraph:
>
> "(4) The provisions of this subsection that limit payments to any person, and section 1305(d) of the Agricultural Reconciliation Act of 1987, shall not be applicable to payments received by a State, political subdivision, or agency thereof in connection with agreements entered into under a special conservation reserve enhancement program carried out by that entity that has been approved by the Secretary. The Secretary may enter into such agreements for payments to States, political subdivisions, or agencies thereof that the Secretary determines will advance the purposes of this subtitle." [Emphasis added.]

Act of August 11, 1988, Pub. L. No. 100-387, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 951 (to be codified at 16 U.S.C. §3834 (f)).

The legislative history explains the legislation in the following terms:

> Section 323 (sic) will allow States to establish and to administer Conservation Reserve Programs enhancement measures which meet with the Secretary's approval. Under contracts entered into with participating producers, the State or an entity of the state could provide to a producer a lump sum payment equal to the annual rental payments the producer is due to receive from the Federal government for the full term of the CRP contract. In return for making the lump sum payment to the producer, the state will collect the annual

> Conservation Reserve Program rental payments directly from the Federal government.

House Report No. 100-800, page 63, reprinted in 1988 U.S. Code Cong. & Admin. News 1192, 1231.

The Authority's proposed program, as it was briefly described in your opinion request, appears to be the type of program which Congress intended to promote by passing Section 322. The central question, therefore, is whether the Authority is a state, political subdivision, or agency thereof within the meaning of Section 322, capable of entering into a special conservation reserve program agreement.

Section 348.020, RSMo 1986, creating the Authority, provides:

> 348.020. Authority created--powers to vest in commission--commissioners, number, appointment, qualifications.--There is hereby created, with such duties and powers as are set forth in sections 348.005 to 348.180 to carry out the provisions hereof, a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions, to be known as the "Missouri Agricultural and Small Business Development Authority". . .

The language used in creating the Authority makes the Authority an entity separate from the State to the extent that the Authority may issue bonds and perform other functions that the State itself would be prohibited from performing under such sections as Article III, Sections 39(1) and (2) of the Missouri Constitution. See State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. banc 1975) and Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73 (Mo. banc 1979).

By inserting the phrase "not a state agency," which is included in Section 348.020, the General Assembly made it clear that the Authority's obligations are not those of the State, and thus brought the Authority's activities within the protection of State ex rel. Farmers' Electric Cooperative, Inc. and Menorah Medical Center.

Like the Missouri Housing Development Commission, however, the Authority is an instrumentality through which the State provides a service it could not otherwise provide. See Missouri Attorney General Opinion No. 168, Antonio, 1981. Because the Authority is such an instrumentality, it can be considered an agency of the State where "agency" is given its broadest meaning. "Agency" has been defined as "that by which something is done; means; instrumentality." Webster's New World Dictionary, (2d ed. 1978). Similarly, "agency" has been defined as "every relation in which one person acts for or represents another by the latter's authority." Black's Law Dictionary (4th ed. 1951). Under these broad definitions of "agency," the Authority, as an instrumentality of the State, can be considered an entity capable of entering into the agreement contemplated by Section 322. This reading would not detract from the conclusion that under state law, the Authority is not a "state agency" that would be prohibited by the Missouri Constitution from engaging in certain activities which the General Assembly authorized the Authority to undertake.

The Authority's purposes, as outlined in Section 348.010, RSMo 1986 and the Authority's powers, as set forth in Section 348.070, RSMo 1986, indicate that the Authority is particularly well suited to carry out the purpose of Section 322.

The legislative history of Section 322 provides that, "[u]nder contracts entered into with participating producers, the State or an entity of the state could provide to a producer a lump sum payment equal to the annual rental payments the producer is due to receive from the Federal government for the term of the CRP contract." Congress' use of the words "the State or an entity of the state" seems to indicate that Congress wanted the program to be carried out by some suitable "entity" capable of carrying out the purposes of the law. Neither Section 322 nor the legislative history indicates that Congress wanted to ensure that a participating state would pledge its full faith and credit in support of any obligations that might need to be issued to carry out the purposes of Section 322. If Congress had intended to so narrowly restrict the way in which the purpose of Section 322 was to be undertaken, it could certainly have used more precise language. Therefore, in answer to your first question, we conclude that the Authority, an instrumentality of the State, is a proper entity to enter into the agreement contemplated by Section 322.

Your second question concerns the Authority entering into agreements with the participating farmers. In order to answer your second question, we must turn again to the legislative history of the federal law in question, which provides:

> State CRP participation: The bill will revise the conservation reserve program payment limitation rules to enable States and local governments to enter into agreements with farmers who are CRP participants. Under such agreements, the State or local government would advance CRP rental payments in a lump sum to the farmer in need of operating capital and the State or local government would, in effect, take over the farmer's CRP contract.

House Report No. 100-800, page 32, reprinted in 1988 U.S. Code Cong. & Admin. News 1192, 1199.

The last clause of the preceding quote clearly indicates that Congress intended for the entity operating the special conservation reserve program to succeed to the rights and obligations of the CRP contracts executed by farmers seeking to participate in the special conservation reserve program, "the State or local government would, in effect, take over the farmer's CRP contract." The Authority's power to "take over" the CRP contract rights and obligations of farmers seeking to participate in the special conservation reserve program is found in the broad statutory grants of power in Sections 348.010.1(7), 348.070, and 348.090, RSMo 1986. Based on the Authority's power under state law and the congressional purposes underlying the federal law in question, we conclude that the Authority may enter into binding agreements whereby the Authority will succeed to the rights and obligations of the participating farmers executing CRP contracts.

Your third question concerns the proper person to sign the various agreements. Section 348.020, RSMo 1986, vests the powers of the Authority in seven commissioners, appointed by the Governor with the advice and consent of the Senate. Section 348.050, RSMo 1986, provides, in part:

> Four commissioners of the authority shall constitute a quorum, and any action taken by the authority under the provisions of sections 348.005 to 348.180 may be authorized by resolution approved by a majority, but not less than four, of the commissioners present at any regular or special meeting.

Charles E. Kruse, Director

Section 348.060, RSMo 1986, states that the commissioners shall employ an executive director who is granted the following authority and duties:

> The executive director shall be the secretary of the authority and shall administer, manage, and direct the affairs and business of the authority, subject to the policies, control, and direction of the commissioners. . . . The commissioners may delegate to the executive director, or to one or more of its agents or employees, such powers and duties as it may deem proper.

Assuming the commissioners authorized, by a resolution approved by a majority, but not less than four, of the commissioners, the signing of the special conservation reserve enhancement agreement with the United States Department of Agriculture (hereinafter "USDA"), the commissioners may then delegate to the executive director the actual task of physically signing the agreement with USDA. Similarly, if the commissioners authorized, by resolution approved by a majority, but not less than four, of the commissioners, the signing of a standard agreement with various farmers whereby the farmers assign the CRP contracts to the Authority, then the commissioners could delegate to the executive director the authority to sign the individual agreements with the farmers. This would facilitate the signing of the numerous agreements with the various farmers likely to participate in this program. Of course,the commissioners could sign each and every agreement themselves. Therefore, in answer to your third question, we conclude that the commissioners, themselves, may sign the agreements on behalf of the Authority or the commissioners may delegate to the executive director the authority to sign the agreements.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ASSESSORS:
CONFLICT OF INTEREST: It would be a conflict of interest, as a matter of public policy, for a county assessor to appraise property in his individual capacity as a private appraiser within the county for which he serves as county assessor.

September 14, 1989

OPINION NO. 84-89

Michael A. Insco
Buchanan County Prosecuting Attorney
Buchanan County Courthouse
St. Joseph, Missouri 64501

Dear Mr. Insco:

This opinion is in response to your question asking:

> If a county assessor works as a private appraiser or operates a property appraisal business without connection to tax matters, does he violate the conflict of interest statutes (Chapter 105, RSMo) or any other provision of law?

You provided the following information:

> Our present County Assessor has been asked on numerous occasions by banks, loan companies, and mortgage companies to personally prepare an appraisal for their use. Our assessor has a reputation as being one of the finest appraisers available. These companies need a detailed appraisal of commercial and residential properties both inside and outside the county requiring detailed knowledge of income, market and cost approach appraisals.
>
> These appraisals are used primarily by institutions for loan approval. They are detailed documents submitted to the institutions' loan committees and boards for purposes of approving loans. They include

> far more detail than would be contained in a normal appraisal for tax purposes. The question is whether or not providing these services for a fee on his own time outside the office and unconnected to his tax duties violates Missouri law.

A county assessor is a public official subject to the general conflict of interest law, Sections 105.450, et seq., RSMo 1986. These statutes contain no specific prohibition against a county assessor's employment as a private appraiser such as you have described in your letter. However, if such employment is contrary to public policy, it is prohibited.

Generally, it has been stated:

> In accordance with the principle . . . that an agreement which tends to interfere with the free exercise of a public officer's discretion is illegal, a contract entered into by a public officer in his individual capacity, the effect of which is to create a personal interest which may conflict with the officer's public duty, is contrary to public policy. Such may be the case where a public officer enters into a contract to perform services for the public, or where he accepts employment by one upon whose acts he must pass in his official capacity. Such contracts are sometimes prohibited by statute.

63A Am Jur 2d, Public Officers and Employees, Section 337.

Section 53.030, RSMo 1986 provides:

> 53.030. Oath. - Every assessor shall take an oath or affirmation to support the Constitution of the United States and of this state, and to demean himself faithfully in office and to <u>assess all of the real and tangible personal property in the county</u> in which he assesses at what he believes to be the actual cash value. He shall endorse this oath on his certificate of election or appointment before entering upon the duties of his office. (Emphasis added.)

Michael A. Insco

Under Section 53.030, RSMo 1986, the county assessor's job is to "assess." Generally, "assess" has the following meaning or meanings:

> The word "assess" has a well-defined meaning when used in connection with the taxation of property. In its primary meaning, "assess" means to tax; to impose a tax; to levy a tax; to charge with a tax; to declare a tax to be payable; to apportion a tax among several . . .
>
> In its secondary or derivative meaning, "assess" means to place a value on property for the purpose of forming the basis on which a tax is to be computed; to place a valuation on property for the purpose of apportioning a tax; or to value in order to tax.

84 C.J.S. Taxation, Section 391.

In appraising any specific property in his individual capacity, the county assessor would be placing a specific value on the property. In assessing property in his official capacity, the county assessor would be placing a specific value on the same property. The appraisal performed in his individual capacity may be more complex and vary in other respects from the appraisal performed officially. What remains the same, however, is that the county assessor, in both instances, would be placing a specific value on the same property.

It is not difficult to realize that the valuation of specific property for loan purposes by a bank, savings and loan company, or mortgage company may differ from the official valuation for tax purposes. Such may give rise to a conflict of loyalties, i.e., loyalty to the bank, etc. as opposed to loyalty to the office of county assessor. This is not to say that such division of loyalties would inevitably occur. It is merely to say that it may occur. Under such circumstances, we conclude that it would be a conflict of interest, as a matter of public policy, for a county assessor to appraise property in his individual capacity as a private appraiser within the county for which he serves as county assessor.

CONCLUSION

It is the opinion of this office that it would be a conflict of interest, as a matter of public policy, for a county assessor to appraise property in his individual capacity as a private appraiser within the county for which he serves as county assessor.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

CHIROPRACTICS - CHIROPRACTORS:
INSURANCE:
MEDICAL CARE PLAN:
SELF-INSURER:

Section 375.936(11)(b), RSMo 1986, is not applicable to self insured governmental medical care plans.

July 21, 1989

OPINION NO. 88-89

The Honorable Mark Youngdahl
Representative, District 9
415 Kirkpatrick Building
St. Joseph, Missouri 64501

Dear Representative Youngdahl:

This opinion is in response to your question asking:

> Are governmental insurance plans required to comply with Missouri statutes regarding insurance regulations, specifically, those statutes that prohibit unfair discrimination against chiropractors or other providers?

In your opinion request you state: "Self insured governmental employee benefit plans place limits on chiropractic services to their beneficiaries. These limitations include caps on all services and limitations or exclusions of services or diagnosis that are unique to the chiropractic profession (e.g. subluxation, structural imbalance, segmental joint dysfunction)." Your question apparently relates only to self insured governmental medical care plans.

Section 375.936(11)(b), RSMo 1986, to which you refer in your opinion request provides:

> 375.936. Unfair practices defined.--The following are hereby defined as "unfair methods of competition" and "unfair and deceptive acts or practices" in the business of insurance:
>
> * * *

(11) "Unfair discrimination"

* * *

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever, including any unfair discrimination by not permitting the insured full freedom of choice in the selection of any duly licensed physician, surgeon, optometrist, chiropractor, dentist, psychologist, pharmacist, pharmacy, or podiatrist; provided that the addition of psychologist shall be effective January 1, 1984, and applied to contracts issued by health service corporations and insurance companies doing business in this state after such effective date, and to existing group contracts on the later of the next renewal date or the expiration of any applicable collective bargaining contract, if the services are covered by the terms of the contract when rendered by a licensed physician or doctor of medicine;

Section 375.934, RSMo 1986, provides:

375.934. Unfair competition and deceptive practices prohibited.--No person shall engage in this state in any trade practice which is defined in sections 375.930 to 375.948 as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Section 375.932(3), RSMo 1986, defines "person" as follows:

375.932. Definitions.--When used in sections 375.930 to 375.948

* * *

> (3) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, agencies, brokers and adjusters. "Person" shall also mean medical service plans and hospital service plans as defined in section 354.010, RSMo, provided, however, that medical service plans and hospital service plans shall not include self-insurance plans by corporations and businesses. For purposes of sections 375.930 to 375.948 only, such medical and hospital service plans shall be deemed to be engaged in the business of insurance. "Person" shall include all companies organized, incorporated or doing business under the provisions of chapters 375, 376, 377, 378, 379, 381 and 383, RSMo.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). Based on the language in Section 375.936(11)(b) and the related sections, it is evident that such section does not apply to self insured governmental medical care plans. There is no language in Section 375.936(11)(b) or the related sections which applies such section to self insured governmental medical care plans. Where the language of a statute is clear and unambiguous, there is no room for construction. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986).

In Klinginsmith v. Missouri Department of Consumer Affairs, Regulation and Licensing, 693 S.W.2d 226 (Mo.App. 1985), the court described the sections about which you are concerned as being ostensibly designed to regulate the business of insurance companies. However, because of a statute subjecting health services corporations to such sections, the court concluded that health services corporations must comply with such sections. That decision was based on statutory language applying specifically to health services corporations and no similar language relates to self insured governmental medical care plans.

CONCLUSION

It is the opinion of this office that Section 375.936(11)(b), RSMo 1986, is not applicable to self insured governmental medical care plans.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

LABOR AND INDUSTRIAL RELATIONS,
DEPARTMENT OF:
PREVAILING WAGE LAW:
SUNSHINE LAW:

If a public governmental body retains copies of records of the information set out in Section 290.290, RSMo 1986, they are public records as defined in Section 610.010(4), RSMo Supp. 1988, and must be made available for inspection and copying pursuant to Section 610.023, RSMo Supp. 1988.

June 12, 1989

OPINION NO. 89-89

FILED
89

The Honorable E. J. Cantrell
Representative, District 82
State Capitol Building, Room 311
Jefferson City, Missouri 65101

Dear Representative Cantrell:

This opinion is in response to your question asking:

> Is it permissible for the custodians of records for municipalities, fire districts, school districts or Southeast Missouri State University to refuse to allow access for purposes of inspection or copying (with reasonable costs to be remitted by requestor) records indicating the name, occupation and wages paid all workmen on public projects when such records are maintained by the custodians in question pursuant to Section 290.290 R.S.Mo.?

Section 290.290, RSMo 1986, does not impose a duty upon a contracting governmental body to maintain the records described in your question. Rather, Section 290.290.1, RSMo 1986, provides:

> 290.290. Contractor's payroll records, contents--affidavit of compliance required.--1. The contractor and each subcontractor engaged in any construction of public works shall keep full and accurate records clearly indicating the names, occupations and crafts of every workman employed by them in connection with the public work together with an accurate record of the number of hours worked by

> each workman and the actual wages paid therefor. The payroll records required to be so kept shall be open to inspection by any authorized representative of the contracting public body or of the department at any reasonable time and as often as may be necessary and such records shall not be destroyed or removed from the state for the period of one year following the completion of the public work in connection with which the records are made. [Emphasis added.]
>
> * * *

Contractors are required by this section to keep these records and to allow inspection at any reasonable time by "any authorized representative of the contracting public body."

Department of Labor and Industrial Relations, Division of Labor Standards, Prevailing Wage Law Rules provide as follows:

> (8) Successful bid contractors shall submit certified copies of their payrolls to the contracting public body.

8 CSR 30-3.010(8).

If the contracting governmental body maintains copies of these records, then the question arises as to whether Chapter 610, RSMo, requires that they be made available for inspection and copying.

Section 610.010(4), RSMo Supp. 1988, defines a public record as follows:

> (4) "Public record", any record retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds; . . .

Section 610.010(2), RSMo Supp. 1988, defines a public governmental body as follows:

> (2) "Public governmental body", any legislative, administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, board of regents or board of curators of any institution of higher education, supported in whole or in part from state funds, advisory committee or commission appointed by the governor by executive order, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body.
> . . .

Public governmental bodies are required to "make available for inspection and copying by the public of that body's public records." Section 610.023.2, RSMo Supp. 1988. Section 610.021, RSMo Supp. 1988, sets out specific statutory exceptions allowing records retained by a public governmental body to be closed. A review of Section 610.021 reveals no specific exception applicable to the records described in your question. Section 610.021(13) allows closure of "[i]ndividually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment;" however, it specifically states that "this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies . . ." Therefore, copies of records of the information set out in Section 290.290 are public records as defined in Section 610.010(4) if retained by a public governmental body and must be made available for inspection and copying pursuant to Section 610.023.

CONCLUSION

It is the opinion of this office that if a public governmental body retains copies of records of the information set out in Section 290.290, RSMo 1986, they are public records as defined in Section 610.010(4), RSMo Supp. 1988, and must be made available for inspection and copying pursuant to Section 610.023, RSMo Supp. 1988.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 11, 1989

OPINION LETTER NO. 94-89

John B. Berkemeyer
Gasconade County Prosecuting Attorney
Post Office Box 150
Hermann, Missouri 65041

Dear Mr. Berkemeyer:

This opinion letter is in response to your question concerning the term of office of the city marshal and the city collector for the City of Bland. You state your question as follows:

> The City of Bland has provided for by ordinance that the same person shall be elected as marshal and collector at the same election and hold both offices. This is pursuant to Section 79.050, RSMo, both as previously enacted and as amended by House Bill 1531 in 1988. In the previous bill all the terms of offices were for two years and therefore there was no problem of coinciding with elections. However, in the 1988 amendment to Section 79.050 the term of city marshal was extended to four years while the term of city collector was continued at two years. Thus our question arises, since the marshal was elected in 1988 for a period of four years and the collector for presumably a period of two years, which term prevails and how is that determined?

Section 79.050 as enacted by House Bill No. 785, 85th General Assembly, First Regular Session (1989) (hereinafter "House Bill No. 785"), provides:

> 79.050. 1. The following officers shall be elected by the qualified voters of

> the city, and shall hold office for the term of two years, except as otherwise provided in this section, and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. The marshal or chief of police shall be twenty-one years of age or older. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal, who shall be twenty-one years of age or older, and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified, <u>except that the term of the city marshal shall be four years</u>.
>
> 2. The board of aldermen may provide by ordinance that the term of mayor and of the collector shall be four years. Any person elected as mayor or collector after the passage of such an ordinance shall serve for a term of four years and until his successor is elected and qualified. [Emphasis added.]

The provision in this statute at the end of subsection 1 providing that the term of the city marshal shall be four years was added by the General Assembly in 1988. <u>See</u> House Bill No. 1531, 84th General Assembly, Second Regular Session (1988).

House Bill No. 1531 was effective August 13, 1988. Subsection 2 of this statute was added by the General Assembly in 1989. See House Bill No. 785.

We assume the election in 1988 to which you refer occurred in April, 1988. Section 79.030, RSMo 1986 and as enacted by House Bill No. 785 provides that the election for the elective officers of a fourth class city shall be held on municipal election days. Section 115.121, RSMo 1986, provides that municipal election day shall be the first Tuesday in April each year. Therefore, we assume that the election for city marshal to which you refer in your question occurred in April, 1988 which was prior to the effective date of House Bill No. 1531 (August 13, 1988) extending the term of the city marshal from two years to four years.

Article VII, Section 13 of the Missouri Constitution provides:

> Section 13. Limitation on increase of compensation and extension of terms of office. The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended. [Emphasis added.]

At the time of the April, 1988 election for city marshal, the applicable statute provided a term of two years. Therefore, despite the statutory change later in 1988, the marshal elected in April, 1988 was elected for only a two year term.

The amendment to Section 79.050 in 1989 adding subsection 2 will eliminate the problem about which you are concerned for many fourth class cities. Because the board of aldermen, pursuant to this subsection, may provide by ordinance for a four year term for a collector, those cities which enact such an ordinance and elect the marshal/collector in 1990, will have no problem with the terms of the marshal and collector ending at the same time. See also Section 79.030 which was amended by House Bill No. 785 in 1989 to add the following phrase, "except that cities may provide by ordinance that beginning with the election of a collector after January 1, 1990, collectors shall be elected every four years."

Turning to those cities which do not enact an ordinance as authorized by subsection 2 of Section 79.050 and Section 79.030, we have two possible situations depending on the ordinances of the city. Section 79.050 authorizes the board of aldermen to

provide by ordinance that the same person may be elected marshal and collector at the same election and hold both offices. Under the plain words of this statute, the same person may run for the office of marshal for a four-year term and run for the office of collector for a two-year term. If this person wins the election for each office, that person serves as collector for a two-year term and as marshal for a four-year term. After two years have expired, another election is held for the office of collector. That person may or may not win another term for the office of collector. If that person is defeated for collector after having served a two-year term, that person no longer is the collector but has two years remaining on his term as marshal and continues to hold the office of marshal for the remaining two years of the original four-year term.

A second possibility relates to Section 79.330, RSMo 1986, which allows a city to combine the offices of marshal and collector. Such section provides:

> 79.330. Offices of marshal and collector may be consolidated.--The board of aldermen may by ordinance provide that hereafter the same person shall hold the offices of marshal and collector, in which case his official title shall be "marshal and ex officio collector".

A city may have pursuant to this section, a "marshal and ex officio collector." This title indicates that the person has been elected marshal and by virtue of his election to that office holds the office of collector. Ex officio is defined as "[b]y virtue of the office, ..." 32A C.J.S. definition Ex officio. Therefore, if the city by ordinance has provided for the office of "marshal and ex officio collector," this person serves the term provided for the city marshal which is four years.

In summary, using the assumptions stated previously, the person elected city marshal in 1988 serves a two year term. The term of a city marshal and collector elected subsequent to the 1988 municipal election will depend on the ordinances of the city.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

PEACE OFFICERS:
POLICE:
POLICE TRAINING:
SHERIFFS:

The curriculum for the training program for newly-elected sheriffs required by Sections 590.170 and 590.175, RSMo, need not be identical to the curriculum for the training program for peace officers required by Sections 590.100 to 590.150, RSMo, and newly-elected sheriffs must complete the required training by the end of the six-month period after their election as sheriff.

October 27, 1989

OPINION NO. 100-89

Richard C. Rice, Director
Department of Public Safety
P.O. Box 749
Jefferson City, Missouri 65102

Dear Director Rice:

This opinion is in response to your question asking:

> Sheriffs, while not required to be certified, are required to complete at least 120 hours of training. Must the 120 hours of training consist of the basic 120 hour course curriculum or does the director have the discretion of approving other 120 hour to 130 hour training courses as being acceptable and how soon must the approved course be completed?

Section 590.170, RSMo Supp. 1988, provides:

> 590.170. Director to consult with sheriffs to develop training program for first term sheriffs.--1. The director shall consult with Missouri sheriffs and their professional organizations and after such consultation shall formulate a training program for persons elected for the first time to the office of sheriff for the purpose of developing improved law enforcement procedures throughout the state.
>
> 2. The training program shall consist of at least one hundred twenty hours of

> instruction covering all major phases of law enforcement with emphasis on the duties and responsibilities of sheriffs.

Section 590.175, RSMo 1986, provides:

> 590.175. Attendance required--time of attendance--compensation and expenses.--1. Any person who is elected to his first term as sheriff in a general election or in a special election in any county of this state shall, within six months of said election, cause to be filed with the presiding circuit judge of the county and director of the department of public safety proof that he has completed the training program formulated pursuant to sections 590.170 and 590.175 or some other comparable training program of not less than one hundred twenty hours instruction approved by the director of the department of public safety. [Emphasis added.]

Sections 590.170 and 590.175 were originally enacted in 1978 by House Bill No. 880, 79th General Assembly, Second Regular Session. Laws of Missouri, 1978, page 991. Section 590.170 as originally enacted was amended in 1988 by Conference Committee Substitute for Senate Committee Substitute for Senate Bill No. 532, 84th General Assembly, Second Regular Session. Laws of Missouri, 1988, page 995. Subsection 2 of Section 590.170 as originally enacted in 1978 provided:

> 590.170. Superintendent to develop training program for sheriffs--length, content.--
>
> * * *
>
> 2. The training program shall consist of at least one hundred twenty hours but not more than one hundred thirty hours of instruction covering all major phases of law enforcement with emphasis on the duties and responsibilities of sheriffs. [Emphasis added.]

The phrase "but not more than one hundred thirty hours" was deleted by the 1988 amendment.

The other provisions in Chapter 590, RSMo, as originally enacted in 1978, were enacted by House Committee Substitute for House Bill Nos. 879 and 899, 79th General Assembly, Second Regular Session. Laws of Missouri, 1978, page 988. The sections enacted by this bill related to standards for the selection and training of peace officers in Missouri and were numbered Sections 590.100 to 590.150, RSMo. These sections have been amended since their enactment but the amendments do not affect the conclusion herein.

In interpreting a statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo.banc 1983). The plain meaning of the statutory language is to be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo.banc 1984). In determining the legislature's intent, it is proper to review the legislative history for guidance. Pippin v. City of Springfield, 596 S.W.2d 770, 775 (Mo.App. 1980).

With respect to the first part of your question concerning the curriculum for training for newly-elected sheriffs, we conclude the curriculum need not be identical to the training given other peace officers under Sections 590.100 to 590.150, RSMo. The training requirement for newly-elected sheriffs was mandated by a different bill (House Bill No. 880) than the bill that set forth standards for the selection and training of peace officers (House Bill Nos. 879 and 899). Section 590.170, RSMo Supp. 1988, provides the director of the Department of Public Safety shall consult with Missouri sheriffs and their professional organizations and after such consultation shall formulate the training program for newly-elected sheriffs. Such consultation indicates an intent the training for newly-elected sheriffs may be aimed specifically at newly-elected sheriffs which would result in it not being identical to training for other peace officers. Furthermore, subsection 2 of Section 590.170 states the training program for newly-elected sheriffs shall emphasize the duties and responsibilities of sheriffs. Again, this indicates the training would not be identical to the training for other peace officers. Based on the language of the statutes in question, we conclude the curriculum for the training program for newly-elected sheriffs need not be identical to the training given other peace officers.

The second part of your question asks how soon newly-elected sheriffs must complete the training specified in Sections 590.170 and 590.175, RSMo. Section 590.175, RSMo 1986, specifies a time period of six months of their election as

sheriff for filing proof of completion of the training course. Based on the plain meaning of this statutory language, we conclude such training must be completed by the end of the six-month time period specified for filing proof of completion of the training.

CONCLUSION

It is the opinion of this office that (1) the curriculum for the training program for newly-elected sheriffs required by Sections 590.170 and 590.175, RSMo, need not be identical to the curriculum for the training program for peace officers required by Sections 590.100 to 590.150, RSMo, and (2) newly-elected sheriffs must complete the required training by the end of the six-month period after their election as sheriff.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

BOUNDARIES:
CHARTER CITIES:
CITIES, TOWNS AND VILLAGES:
CONSTITUTIONAL
CHARTER CITIES:

A constitutional charter city has the power to alter its boundaries so as to exclude territory from its corporate limits and such city is empowered to develop its own procedures to accomplish this.

May 12, 1989

OPINION NO. 102-89

FILED
102

The Honorable Gracia Y. Backer
Representative, District 23
State Capitol Building, Room 408A
Jefferson City, Missouri 65101

Dear Representative Backer:

This opinion is in response to your questions asking:

1. May a charter city (the City of Fulton) de-annex (or remove) land from within its corporate boundary?

2. If the answer to question number 1 is in the affirmative, what is the proper procedure for de-annexing land from the corporate boundary of a charter city? (What should be contained in an ordinance or resolution proposing to de-annex a tract of land from the city boundary?)

We have been informed the City of Fulton adopted its charter and became a constitutional charter city in 1986.

Article VI, Section 19(a), Missouri Constitution, provides:

> Section 19(a). Power of charter cities, how limited. Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Prior to the adoption of Section 19(a) in 1971, the powers of a constitutional charter city were limited to those which the people had expressly delegated to the city under their charter and the powers granted to the city by statute. As the court held in State ex inf. Hannah ex rel. Christ vs. City of St. Charles, 676 S.W.2d 508 (Mo. banc 1984):

> "Section 19(a) clearly grants to a constitutional charter city all power which the legislature is authorized to grant. St. Louis Children's Hospital v. Conway, 582 S.W.2d 687, 690 (Mo. banc 1979). Under Missouri's new model of home rule, even in the absence of an express delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the constitution, by statute, or by the charter itself." Id. at 512.

Since the adoption of Section 19(a), annexations of contiguous land by a constitutional charter city are no longer considered to be an amendment of the city's charter.

> "Under § 19(a) it is no longer necessary for a home rule charter city to claim the power of annexation of a particular parcel of land by charter amendment because, even in the absence of a charter provision, the power to annex is vested in the municipality by virtue of the direct grant of power in § 19(a)." Id.

The Hannah case concerned the question of whether the provisions of Section 71.015, RSMo, which set forth the procedures by which a city can annex land, are applicable to a constitutional charter city. Even though the case did not concern the exclusion or diminishing of territory from a city, since it concerned the power of the city to change its boundaries, the general principles set forth therein concerning the powers of a constitutional charter city are applicable to the questions presented in your request.

As shown by the above-quoted portions of the Missouri Supreme Court's holding, the critical question in regard to a constitutional charter city changing its boundaries is whether such action would contravene some provision in the city's charter, or in the state constitution or state statute.

As is our usual practice, we do not interpret city charters or ordinances. The letter from the city attorney accompanying your opinion request states only that the charter and ordinances contain "no procedure for De-Annexation of property from the Corporate boundaries of the city." He does not indicate that there is any charter provision which would prohibit or limit an action by the city to change its corporate boundaries so as to exclude previously incorporated territory from its limits. We, therefore, assume that excluding the territory in question does not contravene any provision of the city charter.

The next query is whether the proposed detachment contravenes a state constitutional provision or state statute. In this regard, we must be guided by the principles set forth by the Missouri Supreme Court in Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. banc 1986), which are as follows:

> "Conflicts between local enactments and state law provisions are matters of statutory construction. Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance provision is made, the state law provision controls. . . . The test for determining if a conflict exists is whether the ordinance 'permits what the statute prohibits' or 'prohibits what the statute permits.'" [citations omitted]. Id. at 211.

Statutes granting powers to municipalities are not to be construed to limit constitutional charter cities "'unless the statute in question was so comprehensive and detailed as to indicate a clear intent that it should operate as both authorization and limitation.'" Id. at 212, quoting from Missouri Local Government at the Crossroads: Report of the Governor's Advisory Council on Local Government Law, p. 5 (1968). The court went on to hold:

> "In carrying out the intent behind section 19(a), caution should be exercised in finding that a power granted to non-home rule cities places an implied limitation on the powers derived from section 19(a), unless such an intent is clear from the constitution or statute itself." Id.

Utilizing these principles, we have found no provision in state law, either in the state constitution or state statute,[1] which would withhold from a charter city the power to alter its boundaries in such a way as to exclude presently incorporated territory from its boundaries.

Since there is no provision in the city charter, or in the state constitution or state statutes prohibiting a constitutional charter city from altering its boundaries so as to detach from itself territory presently within its boundaries, it is the opinion of this office that the City of Fulton has the power to so alter its boundaries.

In regard to the second question requesting a description of the proper procedure to be followed, we believe that, since no procedures expressly applicable to charter cities are set forth in the state constitution or state statutes, a constitutional charter city is thereby authorized to fashion by appropriate legal enactment its own procedures. It would be inappropriate for this office to formulate these procedures for the city.

CONCLUSION

It is the opinion of this office that a constitutional charter city has the power to alter its boundaries so as to exclude territory from its corporate limits and such city is empowered to develop its own procedures to accomplish this.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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1. Sections 71.016 to 71.019, RSMo 1986, deal with when a city "is liable to be inundated as a result of the construction of a lake, reservoir or other body of water." Section 71.016, RSMo 1986. Section 71.018, RSMo 1986, provides for the exclusion of territory from the boundaries of the city under certain circumstances. We assume these sections have no application to the question posed in your opinion request.

INCOME TAX:
INTERGOVERNMENTAL TAX IMMUNITY:
TAXATION - GENERAL:
TAXATION - INCOME TAX:
TAX REFUNDS:

(1) Based on the principles stated in Paul S. Davis v. Michigan Department of Treasury, No. 87-1020 (U.S. March 28, 1989), taxation of retirement benefits of federal civil service and military retirees under current Missouri income tax statutes is invalid, and (2) the State of Missouri must recognize timely income tax refund claims filed by federal civil service and military pensioners.

April 17, 1989

OPINION NO. 104-89

The Honorable James L. Mathewson
President pro tem of the Senate
State Capitol Building, Room 326
Jefferson City, Missouri 65101

and

The Honorable Bob F. Griffin
Speaker of the House
State Capitol Building, Room 308
Jefferson City, Missouri 65101

FILED
104

Dear Senator Mathewson and Representative Griffin:

This opinion is in response to your questions asking:

> a. Are the pension benefits of federal civil service and military employees exempt from Missouri income tax based on the principles declared in Paul S. Davis v. Michigan Department of Treasury, 87-1020 (U.S. 3/28/89)?
>
> b. Must the State of Missouri recognize timely income tax refund claims filed by federal civil service and military pensioners for the tax years 1985, 1986, 1987 and 1988?

In Paul S. Davis v. Michigan Department of Treasury, No. 87-1020 (U.S. March 28, 1989), the United States Supreme Court held that Michigan's tax scheme violated the principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The

appellant, Paul S. Davis, a Michigan resident, was a former employee of the United States government. He received retirement benefits pursuant to the Civil Service Retirement Act. For the years 1979 through 1984, the appellant paid Michigan state income tax on his federal retirement benefits in accordance with Michigan law. Michigan law defined taxable income in a manner that excluded all retirement benefits received from the state or its political subdivisions but included most other forms of retirement benefits. As noted by the United States Supreme Court, the effect of this definition was that the retirement benefits of retired state employees were exempt from state taxation while the benefits received by retired federal employees were not.

In reaching its decision, the United States Supreme Court discussed the judicial doctrine of intergovernmental tax immunity as applied to attempts to impose federal income tax on state and local government employees and attempts to impose state income tax on federal employees. Prior to the adoption of the Public Salary Tax Act of 1939 by the United States Congress, salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign. Dissatisfied with the uncertain state of affairs due to judicial revision of the doctrine of intergovernmental tax immunity and concerned that considerations of fairness demanded equal tax treatment for state and federal employees, Congress decided to ensure that federal employees would not remain immune from state taxation at the same time that state government employees were required to pay federal income taxes. Thus, the Public Salary Tax Act of 1939 was passed, including what is now § 111 (4 USCA § 111). In pertinent part this section states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

In Davis, the United States Supreme Court placed great reliance upon the final clause of the section which contains an exception for state taxes that discriminate against federal employees on the basis of the source of their compensation. The Court concluded that Congress defined the scope of immunity retained in § 111 based upon the prior judicial doctrine barring taxes that operate so as to discriminate against the government or those with whom it deals. Accordingly, the Court found that

the tax imposed upon Mr. Davis by the State of Michigan was barred by the doctrine of intergovernmental tax immunity because it discriminated against retired federal employees in favor of retired state and local employees.

In reaching its conclusions, the Court rejected the argument that retirement benefits do not constitute compensation for personal services as an officer or employee of the United States as set forth in § 111. The Court noted that the amount of benefits to be received in retirement is based and computed upon an individual's salary and years of service even though retirement pay is not actually distributed during the time an individual is working for the government. Therefore, the Court concluded that civil service retirement benefits are deferred compensation for past years of service rendered to the government and thereby fall squarely within the category of compensation for services rendered "as an officer or employee of the United States." Although Mr. Davis was a civil servant, the reasoning of the Court would apply equally to a retired member of the armed forces of the United States, who would also be an officer or employee of the United States as set forth in § 111.

After concluding that the Michigan income tax act violated principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees, the Court also discussed remedies. First of all, the court noted that the state had conceded that a refund was appropriate in the circumstances to the extent that Mr. Davis had paid taxes pursuant to the invalid tax scheme. However, the Court declined to issue prospective relief as requested by Mr. Davis because of its belief that the State of Michigan and the Michigan courts were in the best position to determine how to comply with the mandate of equal treatment. The Court noted that invalidation of Michigan's income tax law in its entirety would eliminate the constitutional violation but felt that such a drastic solution was not required in this case. Accordingly, the cause was then remanded to the Michigan courts for further proceedings in accordance with the United State Supreme Court's decision.

Like Michigan, Missouri exempts the retirement benefits of state and local employees from state income tax while imposing said tax on the benefits of federal retirees. Like Michigan, Missouri is subject to the doctrine of intergovernmental tax immunity and the pronouncements of the United States Supreme Court on that subject. The reasoning of the United States Supreme Court in Davis is clear. Under the principles announced by the United States Supreme Court in Davis, taxation of the retirement benefits of federal employees by the

State of Missouri is discriminatory and invalid. Therefore, in answer to your first question, we conclude taxation of retirement benefits of federal civil service and military retirees under current Missouri income tax statutes is invalid.

Turning to your second question, Missouri law allows any taxpayer who has overpaid his income tax to file a claim for refund with the Director of Revenue. See Section 143.781, RSMo Supp. 1988; Section 143.801, RSMo 1986; and Section 143.821, RSMo Supp. 1988. Although the meaning of the word "overpayment," as used in the Missouri income tax statutes, has never been judicially determined in this state, the Missouri Supreme Court has construed that term as used in other refund sections under Title X, Taxation and Revenue, of the Missouri statutes to include the payment of an illegal tax. Community Federal Savings & Loan Association v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988). In that decision, the Missouri Supreme Court determined that certain savings and loan associations were entitled to refunds of intangible personal property taxes paid under Section 148.480, RSMo 1978, which was held to be unconstitutional in Jefferson Savings and Loan Association v. Goldberg, 626 S.W.2d 640 (Mo. banc 1982). The Missouri Supreme Court in Community Federal stated:

> A reasonable construction of the terms "overpayment" and "erroneous" as used in section 136.035 includes the term "illegal" as seen from other interpretations by this Court, the plain meaning of the language and the definition in Black's Law Dictionary.
>
> The State of Missouri has thus consented to a refund of any overpayment, erroneous or illegal payment, which would include a tax declared unconstitutional, of any tax on intangible personal property by the terms of section 136.035; . . .

752 S.W.2d at 798.

The reasoning of the Missouri Supreme Court in the Community Federal case is applicable to this situation.[1] By enacting statutes allowing a refund for overpayment of Missouri income tax, the State of Missouri has consented to a refund of any overpayment, including a tax subsequently declared unconstitutional or invalid, if the taxpayers follow the proper procedures for applying for a refund. Section 143.821, RSMo Supp. 1988, requires the taxpayer to file a claim for refund

with the Director of Revenue in writing and to state the specific grounds upon which it is founded. Section 143.801.1, RSMo 1986, states that any claim for credit or refund of an overpayment of any tax imposed under the income tax chapter is to be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; or if no return was filed by the taxpayer, within two years from the time the tax was paid. Since these statutes waive the immunity of the state from suit, they must be strictly construed. Kleban v. Morris, 363 Mo. 7, 247 S.W.2d 832, 837 (1952). Any taxpayer seeking a refund in light of the Davis decision must follow the procedural requirements set forth in the statutes for claiming said refund. Furthermore, the Director of Revenue cannot grant any refund claimed beyond the period of limitation set forth in Section 143.801, RSMo 1986. Therefore, in answer to your second question, the State of Missouri must recognize timely income tax refund claims filed by federal civil service and military pensioners.

CONCLUSION

It is the opinion of this office that (1) based on the principles stated in Paul S. Davis v. Michigan Department of Treasury, No. 87-1020 (U.S. March 28, 1989), taxation of retirement benefits of federal civil service and military retirees under current Missouri income tax statutes is invalid, and (2) the State of Missouri must recognize timely income tax refund claims filed by federal civil service and military pensioners.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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1. It should be noted that the United States Supreme Court has not issued decisions in two pending cases, American Trucking Association, Inc. v. Smith, No. 88-325 (746 S.W.2d 377, Ark. 1988) and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, No. 88-192 (524 So.2d 1000, Fla. 1988), in which the Arkansas and Florida Supreme Courts declined to grant refunds to taxpayers for taxes paid pursuant to taxation statutes later declared unconstitutional. However, because the

Senator James L. Mathewson and Representative Bob F. Griffin

Missouri Supreme Court has already determined in Community Federal that taxpayers are entitled to refunds where taxation statutes are declared unconstitutional, these decisions will have no impact on the refunds in the situation about which we are concerned.

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 28, 1989

OPINION LETTER NO. 106-89

The Honorable Margaret Kelly, CPA
State Auditor
Post Office Box 869
Jefferson City, Missouri 65102

Dear Mrs. Kelly:

This opinion letter is in response to your question asking:

> Under the county official compensation law, in particular Laws 1987, Senate Bill 65, et al., as amended by Laws 1988, S.B. 431, is it appropriate to make an adjustment at the collector's annual settlement to be sure that his annualized compensation is equal to the greater of either his "scheduled" compensation or his prior fee based compensation?

Your opinion request indicates your question relates to your audits of third class counties.

The county collector is elected for a four year term beginning on March 1 of the year in which he takes office. See Sections 52.010 and 52.015, RSMo 1986. Prior to the enactment of Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216 and 231, 84th General Assembly, First Regular Session (1987) (hereinafter referred to as "Senate Bill No. 65"), the county collector's compensation consisted of commissions and fees on the amounts collected plus any application training fund monies. See, for example, Sections 52.250, et seq., 52.245, 151.280, and 245.250, RSMo 1986. For the purpose of determining his annual compensation, the collector had a settlement year beginning on March 1 and ending the end of February of the succeeding year. See Section 139.160, RSMo 1986.

In Senate Bill No. 65, the Missouri legislature repealed statutes compensating the county collector on the basis of commissions and fees and placed the county collector, effective January 1, 1988, on an annual salary to be computed on the basis of population and assessed valuation, as set forth in a statutory schedule (Section 52.269, Senate Bill No. 65). Generally, any commissions and fees collected by the collector after January 1, 1988, were to be paid into the county treasury. See Sections 52.250, et seq., 151.280 and 245.250, Senate Bill No. 65.

Although Senate Bill No. 65 contained a schedule for computing salary on the basis of population and assessed valuation, subsection 9 of section 7 of the bill specified that action by the county salary commission to determine the annual compensation within the statutory framework "shall not require or permit a reduction in the amount of compensation received by any person holding office as of the effective date of this section."

Under the statutory schedule set forth in Senate Bill No. 65, the collector's salary can be computed on a calendar year beginning January 1, 1988. In order to determine whether this represented a reduction in compensation, it was necessary to compare the statutory salary against the commissions and fees received by a collector under the old law for a like period. In order to insure no reduction in compensation, it was apparent that the comparison must be made to the collector's latest fiscal year, March 1, 1987 to February 29, 1988, even though the statute was silent on this point and such fiscal year for the collector did not expire until February 29, 1988, two months after Senate Bill No. 65 went into effect.

The legislature clarified its intention in Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session (1988) (hereinafter referred to as Senate Bill No. 431), effective May 13, 1988, which repealed Section 52.269, as enacted in Senate Bill No. 65, and re-enacted that section with modifications. Specifically, Section 52.269, RSMo Supp. 1988, as enacted in Senate Bill No. 431, provides in part:

> A county collector subject to the provisions of this section shall not, except upon two-thirds vote of all the members of the salary commission, receive an annual compensation less than the total compensation being received by the county

> collector in that county for services rendered or performed for the period beginning March 1, 1987, and ending February 29, 1988, unless such total compensation paid exceeds the maximum compensation allowable for the office of county collector in such county under the provisions of this section. If the total compensation paid a county collector for the year beginning March 1, 1987, and ending February 29, 1988, exceeds the maximum compensation allowable for the office of county collector in a particular county under the provisions of this section, the compensation of that county collector shall be subject to the following requirements:
>
> (1) For the year beginning March 1, 1991, the county collector shall not, except upon two-thirds vote of all the members of the salary commission, receive an annual compensation of less than the total compensation received for the period beginning March 1, 1987, and ending February 29, 1988;
>
> (2) For the year beginning March 1, 1992, . . .

As of January 1, 1988, the collector began to receive a monthly salary of one-twelfth of the salary allowed the collector based upon the schedule set forth in Section 52.269 as enacted by Senate Bill No. 65 or a higher figure based upon the commissions and fees for the fiscal year ending February 29, 1988. Since this higher figure would be based upon a fiscal year ending two months after the switch to a monthly salary on January 1, 1988, it would have to be based on an estimation of the amount of commissions and fees to be collected during January and February of 1988. Once the amount of the commissions and fees which the collector would have received for January and February were known, the exact amount payable under the old commissions and fees system for the fiscal year ending February 29, 1988, could be calculated and the annual salary payable under Section 52.269 re-adjusted accordingly. Commissions and fees collected by the collector after January 1, 1988, as discussed previously, are paid into the county treasury.

The county collector is not required to reimburse the county for the amount that his salary in January and February of 1988 plus any commissions and fees received from March 1, 1987, to December 31, 1987, exceeded the amount that he would have been paid had he received commissions and fees for those twelve months. The legislature did not require such an adjustment in Senate Bill No. 65 or in Senate Bill No. 431. The commissions and fees which would have been earned are relevant only for the purpose of determining the compensation payable to the county collector under the old law to insure that the collector does not suffer a reduction in compensation. As of January 1, 1988, payment by commissions and fees ceased. Section 52.269, RSMo Supp. 1988, requires the county to pay the county collector an annual salary in equal monthly installments. Absent specific language in the statutes to the contrary, it is the opinion of this office that the county collector is not required to reimburse the county for the amount that his salary in January and February of 1988 plus any commissions and fees received from March 1, 1987, to December 31, 1987, exceeded the amount that he would have been paid had he received commissions and fees for the twelve months ended February 29, 1988.

Very truly yours,

William L Webster

WILLIAM L. WEBSTER
Attorney General

COUNTIES:
COUNTY FUNDS:
PEACE OFFICERS:
POLICE:
POLICE TRAINING:
SHERIFFS:

Training funds collected under Section 590.140, RSMo Supp. 1988, cannot be used to pay a private business to develop personnel and jail administration policies but can be used to train department personnel on such policies.

November 2, 1989

OPINION NO. 107-89

John D. Wiggins
Phelps County Prosecuting Attorney
Phelps County Courthouse
3rd and Main
Rolla, Missouri 65401

Dear Mr. Wiggins:

This opinion is in response to your question asking:

> Does a county of the third class have lawful authority to expend funds collected pursuant to Section 590.140, RSMo., both for the purpose of contracting with a private business to formulate Sheriff's Department personnel and jail administration policies and for the purpose of having the private business train department personnel in accordance with those policies?

The answer to this question depends upon whether Section 590.140, RSMo Supp. 1988, can be construed broadly enough to include the development of personnel and jail administration policies. Subsection 2 of Section 590.140 provides:

> 2. Each county and municipality may use funds received under this section only to pay for the training required as provided in sections 590.100 to 590.180, provided that, any excess funds not needed to pay for such training may be used to pay for additional training for peace officers or for training for other law enforcement employees appointed by the county or municipality. [Emphasis added.]

John D. Wiggins

Ascertainment of legislative intent is the primary goal of statutory construction. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219, 224 (Mo. banc 1986); Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985); O'Flaherty v. State Tax Commission of Missouri, 680 S.W.2d 153, 155 (Mo. banc 1984). The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider words used in the statute in their plain and ordinary meaning. Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988).

"The word 'only' is defined as meaning 'alone in its class, sole, single, exclusive, solely, this and no other, nothing else or more.'" State ex rel. Collins v. Donelson, 557 S.W.2d 707, 710 (Mo. App. 1977). By the use of the word "only" the legislature has limited the use of funds collected to two purposes: (1) the training required by Sections 590.100 to 590.180, RSMo, and (2) as long as the required training has been received by all officers required to receive that training, additional training for peace officers or training for other law enforcement employees appointed by the county or municipality.

The development of personnel policies or administrative policies by a private business would not be "training" and would, therefore, not be a reimbursable cost using the training funds. On the other hand, training individual officers on existing personnel policies or administrative policies would be other training within the normal scope of a law enforcement officer's duties. Currently, law enforcement training academies in Missouri do offer courses in supervision, police management, civil liability, employee relations, etc. A similar training program by a private business would fall within the scope of this type of training.

CONCLUSION

It is the opinion of this office that training funds collected under Section 590.140, RSMo Supp. 1988, cannot be used to pay a private business to develop personnel and jail administration policies but can be used to train department personnel on such policies.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

BOARD OF CURATORS OF
LINCOLN UNIVERSITY:
LINCOLN UNIVERSITY:

1. Section 175.020, RSMo 1986, requires that one of the nine members of the board of curators of Lincoln University be a full-time student at Lincoln University and this "student curator" is vested with the same powers, duties and responsibilities as are the other eight members of the board of curators. 2. The "student curator", pursuant to Sections 175.020 and 175.030, RSMo 1986, receives from the ordinary revenues of the university his actual expenses for attending the meetings of the board of curators; however, the "student representative" under Section 175.021, RSMo 1986, is prohibited by subsection 6 of that section from receiving expenses. 3. The "student curator" is prohibited from entering into employment as a research assistant or departmental tutor in one of the academic departments at Lincoln University; however, there is no such prohibition in regard to the "student representative" entering into such employment. 4. The board of curators at Lincoln University consists of nine members, and no more; one of those members being the "student curator" provided for in Section 175.020, RSMo 1986.

July 14, 1989

OPINION NO. 113-89

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

Dear Senator Strong:

This opinion is in response to your questions asking:

> 1. Because section 175.021, RSMo 1986, states that the student representative to the Lincoln University Board of Curators shall attend all meetings and participate in all deliberations, except for legally closed meetings and for voting, and because section 175.020, RSMo 1986, refers to the student as a "student curator," is the role of the student member of the board that of a curator, with limitations placed in law, or is the role of the student member one that may be defined and restricted by the other voting members of the board?

2. Section 175.020, RSMo 1986, states that the student member of the board shall receive actual expenses, but section 175.021, RSMo 1986, declares that the student shall receive no compensation or reimbursement. Is the student member of the Lincoln University Board of Curators eligible to receive reimbursement for actual expenses?

3. Does a conflict of interest exist if the student member of the Board of Curators obtains part-time employment at minimum wage in a Lincoln University academic department as a research assistant and departmental tutor?

4. Because section 175.020, RSMo 1986, clearly states that the Lincoln University Board of Curators shall consist of nine members and further states that at least one curator shall be a full-time student at the university, has the number of curators been increased from nine members to ten or is the total, including the student member, still nine members?

Answers to these questions depend on an interpretation of certain sections of Chapter 175, RSMo 1986. When interpreting statutes, we are governed by the following principles:

> The legislative intent behind a statute is to be determined from the language used and the words are to be taken in their plain and ordinary meaning. [Citation omitted.] The legislature is presumed to have intended what a statute says and if the language is clear and unambiguous there is no room for construction. [Citations omitted.] State v. Nevels, 712 S.W.2d 688, 689-690 (Mo.App. 1986).

> This Court must be guided by what the legislature said, not by what the Court thinks it meant to say. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986).

The relevant statute relating to the board of curators of Lincoln University is Section 175.020, RSMo 1986, which provides:

> 175.020. Board of curators -- qualifications. -- The board of curators of Lincoln University of Missouri shall hereafter consist of nine members who shall be appointed by the governor, by and with the advice and consent of the senate. No person shall be appointed a curator who shall not be a citizen of the United States and who shall not have been a resident of the state of Missouri two years next prior to his appointment. Not more than five curators shall belong to any one political party. At least one curator shall be a full-time student at Lincoln University. The student curator while attending the meetings of the board, shall receive his actual expenses, which shall be paid out of the university's ordinary revenue, notwithstanding any other provision of law which may have been adopted. [Emphasis added.]

The statute relating to the "student representative" is Section 175.021, RSMo 1986, which provides:

> 175.021. Nonvoting student representative appointed to board of curators -- term -- qualifications -- vacancy -- limit -- actions -- removal from office. --
> 1. The governor shall, by and with the advice and consent of the senate, appoint a student representative to the board of curators of Lincoln University, who shall attend all meetings and participate in all deliberations of the board, except any meeting, record or vote closed under the provisions of section 610.025, RSMo. Such student representative shall not have the right to vote on any matter before the board.
>
> 2. Such student representative shall be a full-time student at the university as defined by the board, selected from a panel of three names submitted to the governor by the student government association of the

> university, a citizen of the United States, and a resident of the state of Missouri. No person may be appointed who is not actually enrolled during the term of his appointment as a student at the university.
>
> 3. The term of the student representative shall be two years, except that the person first appointed shall serve until January 1, 1989.
>
> 4. If a vacancy occurs for any reason in the position of student representative, the governor shall appoint a replacement who meets the qualifications set forth in subsection 2 of this section and who shall serve until his successor is appointed and qualified.
>
> 5. If the student representative ceases to be a student at the university, or a resident of the state of Missouri, or fails to attend any regularly called meeting of the board of which he has due notice, his position shall at once become vacant, unless his absence is caused by sickness or some accident preventing his arrival at the time and place appointed for the meeting.
>
> 6. The student representative shall receive no compensation or reimbursement for expenses.
>
> 7. The student representatives of all public colleges and universities shall have paid all student and tuition fees due prior to said appointments and shall pay all future student and tuition fees during the term of office when said fees are due.

The language of these sections is clear and unambiguous. Section 175.020 and Section 175.021 provide for two different positions to be filled by full-time students. Section 175.020 provides that one of the nine curators must be a "full-time student at Lincoln University". That curator must, in addition to being a full-time student at Lincoln University, meet the other qualifications for a curator set out therein: he must be a United States citizen; he must have been a resident of

Missouri for two years prior to his appointment; and any membership which he has in a political party will be considered toward the requirement that no more than five of the curators may belong to the same political party. The conclusion that the legislature intended that one of the curators be a full-time student is reinforced by the fact that the underlined portion of the above-quoted Section 175.020 was added by way of amendment to that section. See Laws of Missouri, 1986, page 645.

> When the legislature has altered an existing statute (and here there has been a radical departure from the preexisting statute) such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act. [Citation omitted.] State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985). [Parenthetical comment in original.]

In contrast, the qualifications of the "student representative", the term of office, the means of appointment and means of filling vacancies in the position are as provided in Section 175.021 and differ radically from those pertaining to the "student curator". In particular, the student curator is as much a curator as are the other eight members of the board of curators and he has the same powers, duties and responsibilities, including but not limited to, voting on matters before the board and participating in all deliberations of the board including those meetings, records and votes which are closed under the state open meetings law. While the student representative has the right to participate directly in the deliberations of the board of curators at the open portion of its meetings, the student representative cannot vote and cannot attend the closed meetings, records and votes. Subsection 1 of Section 175.021. The student representative is not a member of the governing body of the University but simply a spokesperson for the student body.

Therefore, in answer to your first question, the "student curator" provided for in Section 175.020 has the same powers, duties and responsibilities as the other eight members of the board of curators. Furthermore, in answer to your fourth question, the "student curator" is one of nine members of the board of curators. He is not a tenth member. Section 175.020 provides for a board of curators made up of nine members and then goes on to describe their qualifications. The 1986 amendment simply added a qualification for one of the members. That amendment does not contain any language indicating that the

"student curator" is in addition to the nine members provided for at the beginning of Section 175.020.

In regard to your second question, pursuant to Sections 175.020 and 175.030, RSMo 1986, the "student curator" receives from the university's ordinary revenue his "actual expenses" incurred while attending the meetings of the board of curators. The person filling the "student representative" position under Section 175.021, however, receives no compensation or reimbursement for expenses. Section 175.021.6.

In regard to your third question, the "student curator" cannot be employed as a research assistant or departmental tutor in an academic department of Lincoln University but the "student representative" can. The employment of a member of the board of curators as an employee of the university would violate principles of public policy on conflicts of interest. This conclusion is based on the premise that the board of curators has the authority to employ and remove all personnel.

Lincoln University was established and operates in accordance with the provisions of Chapter 175, RSMo 1986. Section 175.040, RSMo 1986, sets forth the power and authority of the governing body of the university known as the board of curators. That provision provides:

> 175.040. Board to organize and have same powers as curators of state University of Missouri. -- It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state University of Missouri, except as stated in this chapter.

As is readily apparent, the board of curators of Lincoln University literally "stands in the shoes" of the board of curators of the University of Missouri. Therefore, we must look at the statutory powers of the University of Missouri board of curators. These powers are found in Chapter 172, RSMo 1986. More specifically, Section 172.300, RSMo 1986, makes provision

for the employment of faculty and employees of the University. This section provides in part:

> The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; define and assign their powers and duties, and fix their compensation . . . .

This provision is extremely broad in its scope. However, it is clear from the wording that the board of curators of the University of Missouri, and therefore of Lincoln University, has the authority to employ and remove all personnel. Further, the board has the power to define specific duties and functions for its employees. It must be noted further that there are no exceptions to the powers of the board of curators of Lincoln University as provided in Chapter 175, RSMo 1986. It is clear then that in the employment of a research assistant or departmental tutor the board of curators is the employer.

Missouri courts have long held that it violates public policy on conflicts of interest for a member of a public board to enter into a contract with the entity of which he is a member. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857, 861 (1939). An extended discussion of these principles is included within Missouri Attorney General Opinion No. 465, Norbury, 1966, a copy of which is enclosed. Applying these principles to your question, the "student curator" cannot be employed in a Lincoln University academic department in the manner proposed because he would be employed by the board of which he is a member.

The "student representative" under Section 175.021, however, has no such conflict of interest because the student representative is not a member of the board of curators and, therefore, is not a member of the employing entity. The student representative does not take part in the governance of the university in the manner that a member of the board would. In particular, the student representative cannot vote. Since the student representative is not a member of the board which is the employer of research assistants and departmental tutors, there is no conflict of interest in the student representative being employed as such.

Conclusion

It is the opinion of this office that:

1. Section 175.020, RSMo 1986, requires that one of the nine members of the board of curators of Lincoln University be a full-time student at Lincoln University and this "student curator" is vested with the same powers, duties and responsibilities as are the other eight members of the board of curators.

2. The "student curator", pursuant to Sections 175.020 and 175.030, RSMo 1986, receives from the ordinary revenues of the university his actual expenses for attending the meetings of the board of curators; however, the "student representative" under Section 175.021, RSMo 1986, is prohibited by subsection 6 of that section from receiving expenses.

3. The "student curator" is prohibited from entering into employment as a research assistant or departmental tutor in one of the academic departments at Lincoln University; however, there is no such prohibition in regard to the "student representative" entering into such employment.

4. The board of curators at Lincoln University consists of nine members, and no more; one of those members being the "student curator" provided for in Section 175.020, RSMo 1986.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 465, Norbury, 1966

CITIES, TOWNS AND VILLAGES:
CITY OFFICERS - OFFICIALS:
THIRD CLASS CITIES:
VACANCY:
VACANCY IN OFFICE:

The sentence in Section 77.450, RSMo 1986, providing "[t]he council shall approve the person recommended by the mayor" grants the council discretion to approve or disapprove the person recommended.

September 6, 1989

OPINION NO. 123-89

The Honorable Gene Lang
Representative, District 120
Rt. 7, South Heights
Warrensburg, Missouri 64093

Dear Representative Lang:

This opinion is in response to your question asking:

> RSMo 77.450 states that if a vacancy occurs in any third class city elective office, "In all other counties" (second sentence), "the mayor, or the person exercising the office of mayor, shall recommend a person to fill the vacancy . . ." The section further states, "The council shall approve the person recommended by the mayor."
>
> The question is related to the council's authority to disapprove the recommendation of the mayor. If "shall approve" is interpreted to mean that the council has no option but to approve the choice of the mayor, it is inconsistent with the first sentence which provides for the filling of vacancies in certain first class counties for certain periods "by appointment," without council action. Since the term "recommend" is used in the instance cited, it raises the question of whether the city council has the option to accept or reject the recommendation.

Section 77.450, RSMo 1986, states:

> 77.450. Vacancies, how filled.--In counties of the first class with a charter form of government and which do not contain a city with a population of at least four hundred thousand, if a vacancy occurs in any elective office, the mayor, or the person exercising the office of mayor,

> shall cause a special election to be held to fill such vacancy; provided, however, when any such vacancy occurs within six months of a municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the office of mayor by appointment; provided further, that any vacancy in the office of councilman which may occur within said six months shall be filled by election, in such manner as may be provided by ordinance. In all other counties, if a vacancy occurs in any elective office, the mayor, or the person exercising the office of mayor, shall recommend a person to fill the vacancy from the political party of the person who previously held the office. The council shall approve the person recommended by the mayor. The successor shall serve until the next regular election. If a vacancy occurs in any office not elective, the mayor shall appoint a suitable person to discharge the duties of the same until the first regular meeting of the council thereafter, at which time such vacancy shall be permanently filled. [Emphasis added.]

Ascertainment of legislative intent is the primary goal of statutory construction. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219, 224 (Mo. banc 1986); Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985); O'Flaherty v. State Tax Commission of Missouri, 680 S.W.2d 153, 155 (Mo. banc 1984). The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider words used in the statute in their plain and ordinary meaning. Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988); Thomas v. Frazier, 626 S.W.2d 682, 684 (Mo. App. 1981); City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). It is apparent that the legislature did not intend that it was mandatory that the city council approve whomever the mayor recommends. The statute requires the city council to take action upon the mayor's "recommendation". To interpret the action required to be nothing more than a "rubber stamp" of approval of the mayor's recommended person would be presuming the legislature intended a meaningless act by

the city council. Words must be given some significance as we are not entitled to presume that the legislature inserts meaningless words into a statute. State ex rel. May Department Stores Company v. Weinstein, 395 S.W.2d 525 (Mo. App. 1965).

Construing the word "approve" as allowing the council discretion to approve or disapprove the person recommended is consistent with decisions in other states regarding the meaning of "approve." "It is almost uniformly held that the word 'approved' connotes a confirmation and involves the exercise of judgment and discretion." County Council of Baltimore County v. Egerton Realty, 140 A.2d 510, 512 (Ct. App. Maryland 1958). As stated in Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (South Dakota 1981):

> It is generally held that statutes which vest "approval" authority imply a discretion and judgment to be exercised to sanction or reject the act submitted. [Citations omitted.] The very act of "approval," unless limited by the context of the statute providing therefor, imports the act of passing judgment and the use of discretion, and a determination as a deduction therefrom, [Citation omitted.] and does not contemplate a purely ministerial act. [Citation omitted.] The word "approval" in a statute must be given its usual and accepted sense, where neither the context nor the apparent intention of the Legislature justifies any departure from the ordinary meaning, which is the opposite of "disapproval" and necessarily involves the exercise of discretionary power. [Citation omitted.]

CONCLUSION

It is the opinion of this office that the sentence in Section 77.450, RSMo 1986, providing "[t]he council shall approve the person recommended by the mayor" grants the council discretion to approve or disapprove the person recommended.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

COUNTIES:
COUNTY OFFICERS:
COUNTY OFFICIALS:
COMPENSATION:
SHERIFFS:

A sheriff of a third class county is not entitled to receive the $1,000.00 provided by Section 57.403, RSMo 1986, in addition to his current salary.

December 11, 1989

OPINION NO. 128-89

The Honorable J. R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

Dear Senator Strong:

This opinion is in response to your question asking:

> Is a sheriff in a third class county entitled to receive the $1,000.00 authorized under the provisions of Section 57.403, RSMo 1986, in addition to his current salary?

Section 57.403, RSMo 1986, provides:

> 57.403. Compensation for reporting to highway patrol (third and fourth class counties).--1. In addition to all compensation now provided by law, the sheriff in each county of the third class shall receive the sum of one thousand dollars per year, payable in twelve equal monthly installments out of the county treasury, for the performance of the duties required by sections 43.500 to 43.530, RSMo.
>
> 2. In addition to all compensation now provided by law, the sheriff in each county of the fourth class shall receive the sum of five hundred dollars per year payable in twelve equal monthly installments out of the county treasury, for the performance of the duties required by sections 43.500 to 43.530, RSMo.

Section 57.403, RSMo 1986, was last amended by the Missouri General Assembly in 1986. Laws of Missouri, 1986, page 444. In 1987, as part of Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216, and 231, 84th General Assembly, First Regular Session (hereinafter "Senate Bill No. 65"), the General Assembly enacted Section 57.317 setting forth the compensation of the county sheriff in any county, other than in a first class chartered county. Laws of Missouri, 1987, page 400, 410 (Senate Bill No. 65, Section 4). Section 57.317 as enacted by Senate Bill No. 65 stated that except as provided in the section of the bill authorizing the county salary commission, "the amount provided by this section shall be the total compensation for all services performed by such sheriff." Section 57.317 as enacted by Senate Bill No. 65 was amended by the General Assembly in 1988 by Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session. Laws of Missouri, 1988, page 388, 405. However, the 1988 amendment deleted the sentence containing the phrase "the amount provided by this section shall be the total compensation for all services performed by such sheriff."

We are guided by the following rules of statutory construction: "Where there are two acts on one subject, both should be given effect if possible, but if they are repugnant in any of their provisions, the later act, even sans a specific repealing clause, operates to the extent of the repugnancy to repeal the first." Colabianchi v. Colabianchi, 646 S.W.2d 61, 63 (Mo. banc 1983). "[A]nd this is true though the law does not favor repeal by implication." Id. Also, as explained by the Missouri Supreme Court in Pogue v. Swink, 261 S.W.2d 40, 43 (Mo. 1953), "Another principle of law also applies; that is: The rule that where a later act covers the entire subject of a prior act or acts, manifesting a legislative intent that the later act prescribes the law with respect to the subject matter, the later act supersedes the earlier act or acts."

To understand the significance of Section 57.317, it is necessary to begin with an examination of this law's predecessors. In 1987, before the enactment of Senate Bill No. 65, there were no less than six separate sections which pertained to the compensation of sheriffs of third class counties. Although Section 57.390 purported to set the sheriff's salary, additional compensation was provided by Sections 57.395, 57.405, 57.407 and 57.408, as well as Section 57.403. In enacting Senate Bill No. 65, it is clear that the General Assembly intended to do away with this patchwork

approach to sheriffs' compensation, and replace it with a single comprehensive salary schedule. As passed in 1987, Section 57.317 explicitly provided that the amount provided by such section "shall be the total compensation for all services performed by such sheriff." Although this language was deleted when Section 57.317 was amended in 1988, this statute retained its character as a comprehensive revision of sheriffs' compensation. Thus, as explained in the Pogue case, the earlier act (Section 57.403) has been superseded by this statute (Section 57.317).

The other provisions for additional compensation mentioned above, that is, those found in Sections 57.395, 57.405, 57.407 and 57.408, were expressly repealed by Senate Bill No. 65, and were never re-enacted. Even though Section 57.403 was omitted from this list of repealed sections, nevertheless, Section 57.403 cannot be reconciled with Section 57.317. The earlier statute added $1,000.00 to the compensation "now provided by law." In other words, it provided an add-on to the compensation which sheriffs received at the time the law was enacted. The complete revision of sheriffs' compensation is inconsistent with continued payments pursuant to this section. Thus, as provided by the rule of statutory construction cited in the Colabianchi case, Section 57.403 has been repealed by implication by the later statute.

CONCLUSION

It is the opinion of this office that a sheriff of a third class county is not entitled to received the $1,000.00 provided by Section 57.403, RSMo 1986, in addition to his current salary.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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July 20, 1989

OPINION LETTER NO. 134-89

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Chapter 143, RSMo, and specifically the addition of one new section to be known as Section 143.807. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 10, 1989, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

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July 21, 1989

OPINION LETTER NO. 135-89

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to a proposed law regarding the release of information which is contained in sealed adoption records. A copy of the initiative petition which you submitted to this office on July 11, 1989, is attached for reference.

We conclude the petition must be rejected as to form. We note the following deviations from the statutorily-prescribed form set forth in Section 116.040, RSMo 1986:

1. The petition in the upper right hand corner provides a blank for the "congressional district" while the statutory form provides a blank for the "county."

2. In the sentence at the top of the petition, the petition refers to "qualified" voter while the statutory form refers to "registered" voter.

3. In the first sentence of the petition below the addressee (the sentence commencing "We the undersigned . . . "), the petition refers to "my street address" while the statutory form refers to "my registered voting address."

4. The petition does not contain a "Circulator's Affidavit" in the form as set forth in the statute.

5. The columns set forth on the petition are not consistent with the columns set forth in the statutory form in that:

   a. there is no column on the petition for "date signed" while the statutory form provides for such a column.

   b. the petition refers to "street address" while the statutory form refers to "registered voting address."

   c. there is no column on the petition for congressional district while the statutory form provides a column for "congr. dist."

6. In that part of the petition below the columns, the petition refers to "street address," "qualified voter," and "congressional district" while the statutory form refers to "registered voting address," "registered voter," and "county."

Section 116.040, RSMo 1986 provides in part:

> "If this form is followed substantially, it shall be sufficient, disregarding clerical and merely technical errors."

However, the deficiencies set forth above, both the number of deviations from the statutory form and the significance of some of those deviations, causes us to reject the petition as to form.

Because of our rejection of the form of the petition for the reasons stated above, we have not reviewed the petition to determine if additional deficiencies exist.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

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July 26, 1989

OPINION LETTER NO. 136-89

The Honorable Anthony D. Ribaudo
Representative, District 65
State Capitol Building, Room 309
Jefferson City, MO 65101

Dear Representative Ribaudo:

This opinion letter is in response to your question asking:

> Under Section 184.352 (10) of SCS HCS HB 116 et al., which defines "Special election," may the Metropolitan Zoological Park and Museum District request an election on November 7, 1989 for the purpose stated in the bill, or must there be an additional or pre-existing ballot measure involving the voters of St. Louis City and St. Louis County?

Subsection 10 of Section 184.352 as enacted by Senate Committee Substitute for House Committee Substitute for House Bills Nos. 116, 117 and 34, 85th General Assembly, First Regular Session (1989) (hereinafter "House Bills Nos. 116, 117 and 34") to which you refer in your question, provides:

> "Special election" as used herein shall mean an election held on the first Tuesday of April or whenever propositions are submitted to the voters of the whole district;

We note that the definition of "special election" set forth in Section 184.352 of House Bills Nos. 116, 117 and 34 is substantially the same as that contained in Section 184.352

when it was first enacted in 1969. See Laws of Missouri, 1969, Third Extra Session, page 97.

Section 115.123, RSMo Supp. 1988, sets forth the permissible dates for holding public elections. With certain exceptions, the dates specified in such section are "the general election day, the primary election day, the municipal primary day, municipal general election day, the first Tuesday after the first Monday in February, except in presidential election years, March, June, August, or November or with an election on another day expressly provided by city or county charter." Section 115.123.1, RSMo Supp. 1988. Section 115.125, RSMo 1986, requires with certain exceptions the officer or agency calling an election to notify the election authorities responsible for conducting the election not later than 5:00 p.m. on the eighth Tuesday prior to any election.

We do not interpret subsection 10 of Section 184.352 as requiring there to be an additional or pre-existing ballot measure involving the voters of St. Louis City and St. Louis County. The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). Applying this rule to the language of Section 184.352, the section does not require an additional or pre-existing ballot measure.

In addition, because the Metropolitan Zoological Park and Museum District is required to provide notice of a proposed election to the appropriate election authorities by the eighth Tuesday prior to an election, the same time as notice is required to be provided by other entities calling an election on the same election date, the district cannot receive advance notice of other proposed ballot measures in every instance.[1] It is not reasonable to assume the legislature intended to subject the district to this uncertainty in setting its election dates. The courts presume the legislature did not intend to enact an absurd law and favor a construction that avoids unjust and unreasonable results. State ex rel. McNary v. Hais, 670 S.W.2d 494, 495 (Mo. banc 1984).

It is the opinion of this office that subsection 10 of Section 184.352 does not require there to be an additional or pre-existing ballot measure before the Metropolitan Zoological Park and Museum District can submit a proposition at a special election.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

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[1] In some instances, the district may be required to provide notice to the election authorities prior to the eighth Tuesday before an election. See, for example, Section 184.353.4(1) of House Bills Nos. 116, 117 and 34 which provides in part, "such election officials shall give legal notice at least sixty days prior to such general, primary or special election . . . ."

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August 2, 1989

OPINION LETTER NO. 138-89

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

> Shall the statutes of Missouri be amended to give individual resident taxpayers a tax credit (such credit based upon the additional state income taxes generated by the Federal Tax Reform Act of 1986) for each person they are entitled to claim as a personal exemption for state income tax purposes?

See our Opinion Letter No. 134-89.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
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August 3, 1989

OPINION LETTER NO. 139-89

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to a proposed law regarding the release of information which is contained in sealed adoption records. A copy of the initiative petition which you submitted to this office on July 31, 1989, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

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August 3, 1989

OPINION LETTER NO. 140-89

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to a proposed law establishing a Natural Streams System. A copy of the initiative petition and the proposed law which you submitted to this office on July 31, 1989, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

COORDINATING BOARD OF HIGHER EDUCATION:
SCHOLARSHIPS:
STUDENT FINANCIAL ASSISTANCE PROGRAM:
UNIVERSITIES:

Medical students enrolled in the six-year program at the University of Missouri at Kansas City are eligible for benefits under the Higher Education Academic Scholarship Program authorized by Sections 173.250 to 173.252, RSMo Supp. 1988, until they become graduate or professional students. Six-year medical students become graduate or professional students after completing three years of the program unless, by participating in a federal Title IV financial aid program as undergraduate students, they retain their undergraduate status for a fourth year.

November 13, 1989

OPINION NO. 142-89

The Honorable Wayne Goode
Senator, District 13
State Capitol Building, Room 329
Jefferson City, Missouri 65101

and

The Honorable Ken Jacob
Representative, District 25
State Capitol Building, Room 110B
Jefferson City, Missouri 65101

Dear Senator Goode and Representative Jacob:

This opinion is in response to your question asking:

> May University of Missouri at Kansas City medical students who meet the requirements for the Higher Education Academic Scholarship Program pursuant to Section 173.250, RSMo Supp. 1988, be denied benefits in their third and fourth year of medical studies because the University classifies such students as professional school students?

You have stated the relevant facts to be as follows:

> Third and fourth year students at UMKC Medical School are being denied scholarship

> benefits available under Section 173.250, RSMo Supp. 1988, because the school classifies such students as "Professional School" students. These students have not received their undergraduate degree and are, therefore, undergraduate students under the meaning and intent of section 173.250, RSMo Supp. 1988 even though they are in effect working toward both their undergraduate and professional degrees simultaneously.

The Missouri General Assembly created the Higher Education Academic Scholarship Program (hereinafter sometimes referred to as "HE-ASP") in 1986 to entice college-bound Missourians to pursue their undergraduate educations within the State of Missouri. Sections 173.250 to 173.252, RSMo. The program, sometimes known as the "Bright Flight" Scholarship Program, gives $2,000.00 scholarships to academically talented Missourians who attend a college or university in the state and meet certain other requirements.

The General Assembly defined eligibility for both initial and renewal scholarships in Section 173.250.4, RSMo Supp. 1988, which provides, in relevant part, that:

> 4. A student shall be eligible for . . . renewed academic scholarship if he or she is in compliance with the eligibility requirements set forth in section 173.215 excluding the requirement of financial need, and in addition meets the following requirements:
>
> * * *
>
> (2) Academic scholarships are renewable for each of the sophomore, junior and senior years of college study provided the recipient makes satisfactory academic degree progress as a full-time student.

Section 173.215, RSMo 1986, which contains the eligibility requirements for the Financial Assistance Program, another state student grant program, insofar as it is relevant to this opinion, declares that the student must be enrolled "as a full-time undergraduate student," Section 173.215.1(3), and that the scholarship may be renewed until the student obtains

"a baccalaureate degree, provided such financial assistance shall not exceed a total of ten semesters or fifteen quarters or their equivalent," Section 173.215.2. Taken together, in terms of longevity, a renewal applicant must meet four requirements. He must (1) be a sophomore, junior or senior, (2) be a full-time undergraduate student, (3) not have earned a baccalaureate degree and (4) have completed not more than ten semesters or fifteen quarters or their equivalent.

In a traditional program, a student who plans to practice medicine attends an undergraduate institution for four years, at which point he obtains his baccalaureate. After graduation, he attends a medical school for four years of medical professional education. In such a case, the student would be eligible for four years of HE-ASP grant money.

UMKC, however, has devised a program of medical education that differs from the traditional program. The UMKC medical program combines the requirements for a four-year baccalaureate and a four-year medical doctorate into six years. UMKC awards both degrees at the end of six years. UMKC classifies its students as undergraduates for two years and thereafter as professional students.

Fortunately, the General Assembly recognized that academia might not confine its programs to traditional strictures. To that end, the General Assembly delegated rulemaking power to the Coordinating Board for Higher Education (hereinafter sometimes referred to as "CBHE") to enable it to "[p]romulgate reasonable rules and regulations for the exercise of its functions and the effectuation of the purposes of this section." Section 173.250.3(1), RSMo Supp. 1988. Rules duly promulgated pursuant to properly delegated authority have the force and effect of law as to both the promulgating agency, Missouri National Education Association v. Missouri State Board of Mediation, 695 S.W.2d 894, 897 (Mo. banc 1985), and the general public, Page Western, Inc. v. Community Fire Protection District of St. Louis County, 636 S.W.2d 65, 68 (Mo. banc 1982).

When measuring UMKC medical students against the HE-ASP eligibility standards, we will consider the statutory language and the rules of CBHE as they pertain to the HE-ASP. To the extent that this inquiry does not resolve the question, we will presume that the General Assembly intended the CBHE to administer all student financial aid programs consistently, both because Section 173.250 specifically incorporates the eligibility standards from the state Financial Assistance

Program at Section 173.215, and because statutes relating to the same subject are to be considered together and harmonized if possible. State ex rel. Lebeau v. Kelly, 697 S.W.2d 312, 315 (Mo. App. 1985).

We will next consider the four statutory eligibility requirements previously identified:

1. Sophomore, Junior or Senior.

We have been unable to locate definitions of the terms "freshman", "sophomore", "junior", or "senior" in the statutes, regulations or judicial decisions of the State of Missouri. Absent clear legislative intent to the contrary, a court is likely to construe these words in conformity with their common academic usage. The terms refer to the four individual years of instruction at an undergraduate institution in which a student pursues a bachelor's degree. The term "senior" is sometimes used to describe a person in both his fourth and fifth years of such a program. See 6 CSR 10-2.080(1)(E). This usage is consistent with the requirements of the Financial Assistance Program, Section 173.215.2, which allows up to ten semesters of financial assistance, and assumes that the student can be making satisfactory academic progress during that period. The five-year period is a maximum period of eligibility that may be limited by other legal provisions.

2. Full-time Undergraduate Student.

The second requirement for renewal is that the student be a "full-time undergraduate student." The phrase is not defined as a unit anywhere in the statutes, regulations or case law of the state. Officials at UMKC have advised us that the six-year program combines undergraduate hours with professional school hours in each of the six years. If the words "full-time" modify the word "undergraduate", six-year medical students are never full-time undergraduate students and, thus, are wholly ineligible for the HE-ASP grants. Although the General Assembly has indicated its desire to exclude certain academic programs, see Section 173.215.1(6) (excluding theology and divinity students), we find no evidence of intent to exclude medical students. We presume, therefore, that the General Assembly intended recipients to be both (a) full-time students and (b) undergraduate students, rather than to proscribe any particular course of study.

(a) Full-time Student

A "full-time student" is defined, for purposes of the HE-ASP, as an undergraduate student who is carrying sufficient credit hours to secure the degree for which he is working. 6 CSR 10-2.080(1)(F). Under the Financial Assistance Program, a "full-time student" is one who is enrolled in at least twelve semester hours, but not less than the minimum required for the degree program in which the student is enrolled. 6 CSR 10-2.020(1)(F). We have been advised that persons enrolled in the six-year medical program carry sufficient hours to be "full-time students" in each of their six years.

(b) Undergraduate Student

The term "undergraduate" is not defined in the Revised Statutes of Missouri, nor is the term defined in the rules or case law in connection with the HE-ASP or the Financial Assistance Program.

By far the largest of the state student financial aid programs is Missouri Student Loan Program, created and administered in Sections 173.095 to 173.186, RSMo. The Missouri General Assembly adopted the Missouri Student Loan Program to conform with the federal program established by the Higher Education Act of 1965, P.L. 89-329, (20 U.S.C. Section 1001 et seq.) as amended, and the National Vocational Student Loan Insurance Act of 1965, P.L. 89-287 (20 U.S.C. Section 981 et seq., repealed P.L. 90-575, 82 Stat. 1024 (Oct. 16, 1968)). Like the Missouri General Assembly, Congress left many definitions and details of implementation to regulatory bodies, in this case, the Department of Education. The terms "undergraduate", "professional" and "graduate" are not defined in the statutes.

The significance of the distinction between undergraduates and professional or graduate students, as a matter of federal law, is that under the federal student loan program undergraduates may borrow $2,625 in each of the first two years and $4,000.00 per year thereafter, up to a total of $17,250.00. 20 U.S.C. Section 1075. Professional and graduate students may borrow $7,500.00 per year up to an aggregate of $54,750.00. Id. These distinctions carry over into the Missouri program. As a result, the longer a student in a six-year medical program remains an undergraduate, the longer he is eligible for the HE-ASP. The sooner he becomes a professional student, the sooner he can use the higher dollar limit under the federal student loan program.

Because of the importance of this distinction, the terms "undergraduate," "graduate" and "professional" are carefully defined in connection with state and federal student loan programs. For purposes of the Missouri Student Loan Program, a graduate or professional student is a student who is:

> (1) enrolled in a program or course above the baccalaureate level at an institution of higher education;
>
> (2) enrolled in a program leading to a professional degree;
>
> (3) has completed the equivalent of at least three years of full-time study at an institution of higher education, either prior to entrance into the program or as part of the program itself;
>
> (4) and is not receiving Title IV funds as an undergraduate student for the same period of enrollment.

6 CSR 10-2.030 (This rule incorporates the Student Loan Manual of the Missouri Student Loan Program. See the Definitions/Index section of the manual). The federal definition, which appears at 34 C.F.R. Section 682.200, is similar.

Students in the UMKC program are enrolled in a course of study above the baccalaureate. Students in the UMKC program are enrolled in a program leading to a professional degree. Setting aside--for the moment--any consideration of Title IV funds, under the CBHE definition, a UMKC student would be a professional student in each of his six years, <u>but for</u> the requirement that a professional student have completed the equivalent of three years of study, whether before or within his professional course of study. UMKC medical students cannot be graduate or professional students until they have completed the equivalent of at least three years of full-time study.

Having established that, for purposes of determining eligibility for student financial aid, certain UMKC medical students are not graduate or professional students, it is necessary to decide whether those persons are "undergraduates." For the purposes of the Missouri Student Loan Program, an undergraduate is:

> A student who is enrolled at a school for the purpose of obtaining a bachelor's degree, certificate, or equivalent certification.

6 CSR 10-2.030 (This rule incorporates the Student Loan Manual of the Missouri Student Loan Program. See the Definitions/Index section of the manual.) Because UMKC medical students also receive a baccalaureate degree at the end of the six-year program, they are undergraduate students during the period of time that they are not graduate or professional students. Thus, leaving aside the issue of Title IV funds, a student enrolled in the UMKC six-year medical program is an undergraduate until he completes the equivalent of three years of full-time study, at which point he becomes a graduate or professional student.

One of the attractions of the UMKC six-year medical program is that it telescopes four years of undergraduate work and four years of medical school into six years. This feature of the program presents an additional issue concerning the point at which the student completes "the equivalent" of three years of full-time study. Fortunately, both 6 CSR 10-2.080(1)(F) and 6 CSR 10-2.020(1)(I) indicate that the full-time study requirement is to be construed in the context of the particular degree program. According to those regulations, a student has completed three years of study when he has completed the minimum number of hours to remain in good standing at the end of three years. Officials at UMKC have advised us that students reach this point at the end of three years. Thus, absent any consideration of Title IV funds, a student enrolled in the UMKC six-year medical program is an undergraduate until he completes his third year of the program.

The final part of the definition of a graduate or professional student is that the person in question not be receiving Title IV funds as an undergraduate. A person who might otherwise fit the definition of a graduate or professional student would fail to meet the test, and hence remain an undergraduate student, if he receives Title IV funds as an undergraduate.

"Title IV" appears to be a reference to a portion of the Higher Education Act of 1965, P.L. 89-329, (20 U.S.C. Section 1070 et seq.) as amended. Because qualification for Title IV funds as an undergraduate is a federal question, the federal definition of "undergraduate," which differs slightly from the

state definition, controls eligibility. The federal regulations provide that an undergraduate student is:

> A student who is enrolled at a school in a course or program of study, at or below the baccalaureate level, that usually does not exceed four academic years, or is up to five academic years in length and is designed to lead to a first degree. A student enrolled in any other length program is considered an undergraduate student for only the first four academic years.

34 C.F.R. Section 682.200. As a matter of federal law, a student who is enrolled in both baccalaureate and graduate programs is an undergraduate and thereby eligible for Title IV undergraduate funds for four years. Combining the two definitions, a student enrolled in the dual degree program becomes a graduate or professional student after three years, unless in his fourth year, he seeks and obtains Title IV funds as an undergraduate. As a result, a fourth-year student may decide (1) not to participate in Title IV programs, and become a graduate or professional student; (2) to participate in Title IV programs as a graduate or professional student, thereby becoming a graduate or professional student; or (3) to participate in Title IV programs as an undergraduate student, in which case he does not become a graduate or professional student, but rather retains his undergraduate status.

3. Not have earned a baccalaureate degree.

The third portion of the definition of eligibility is that the student must not have received a baccalaureate degree. Officials at UMKC have advised us that participants in the six-year medical program earn a baccalaureate after six years. As a result, this requirement puts no additional limitations upon students in the six-year medical program.

4. Completed not more than ten semesters or fifteen quarters or their equivalent.

Although the term "semester" is not defined in the statutes, rules or case law pertaining to student aid, the term is commonly used to refer to each of two periods in an academic year. Similarly, "quarter" is commonly understood to refer to one of four periods in an academic year. Officials at UMKC have advised us that students in the six-year medical program

attend school for two long sessions and one summer session each year. This calendar does not mesh conveniently with either ten semesters or fifteen quarters. Of the two standards, the quarter system is better capable of measuring year-round schooling. A student who attended a traditional school would complete his baccalaureate in four years at the rate of three quarters per year, making twelve quarters. He would take another twelve quarters to complete his medical education. He would acquire both degrees at the end of twenty-four quarters.

A student in the six-year medical program of UMKC takes the same number of courses as he would in a traditional program, but finishes both degrees after six years of year-round instruction. In each year, therefore, he completes the equivalent of four quarters of instruction. The fifteen quarters would expire in the course of a student's fourth year of enrollment. Thus, the ten-semester/fifteen-quarter rule limits HE-ASP grant money to students who are in their first four years of the six-year medical program. As a result, UMKC medical students meet this test during their first four years of training. Because a student who is enrolled in the UMKC program cannot be an undergraduate for more than four years, this requirement puts no additional limitations upon those student's HE-ASP eligibility.

CONCLUSION

It is the opinion of this office that medical students enrolled in the six-year program at the University of Missouri at Kansas City are eligible for benefits under the Higher Education Academic Scholarship Program authorized by Sections 173.250 to 173.252, RSMo Supp. 1988, until they become graduate or professional students. Six-year medical students become graduate or professional students after completing three years of the program unless, by participating in a federal Title IV financial aid program as undergraduate students, they retain their undergraduate status for a fourth year.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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August 17, 1989

OPINION LETTER NO. 148-89

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

> Shall the statutes of Missouri be amended to open to the state all records of an adoption, including those sealed by a court or in the possession of any public or private agency; and to provide a process by which any adoptee 18 years of age or older shall have access to his or her records; and to make the state liable for all medical, dental and funeral expenses for an adoptee if the state fails to make the adoption records available within sixty (60) days of receiving a written request from the adoptee?

See our Opinion Letter No. 139-89.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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P. O. Box 899
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August 23, 1989

OPINION LETTER NO. 149-89

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

> Shall there be enacted a Missouri statute to establish a Natural Streams System made up of specific Missouri streams, tributaries and related lands; to be regulated and protected through creation of a Natural Streams Commission and through adoption of management plans and regulations--developed with local input--that maintain existing lawful uses while regulating the future use of the System by prohibiting activities such as the construction of dams and the use of certain motorized vehicles; and by establishing fees for certain System users with revenue from those fees used to help finance administration of this act?

See our Opinion Letter No. 140-89.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

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December 28, 1989

OPINION LETTER NO. 170-89

The Honorable Norman E. Sheldon
Representative, District 107
Post Office Box 132
DeSoto, Missouri 63020

Dear Representative Sheldon:

This opinion letter is in response to your question asking:

> May a taxpayer receive a partial refund of property taxes pursuant to subsection 5 of Section 139.031 as enacted by House Bill No. 728, 85th General Assembly, First Regular Session (1989), for taxes mistakenly or erroneously paid, where within one year after payment of the taxes, the taxpayer discovers, and the county assessor agrees, that: (1) the taxpayer was assessed and paid taxes on a house which the taxpayer did not own, and (2) the taxpayer was assessed and paid taxes on a farm which farm was of significantly fewer acres than the number of acres on which the assessment was based?

House Bill No. 728, 85th General Assembly, First Regular Session (1989)(hereinafter referred to as "House Bill No. 728") repealed Section 139.031, RSMo Supp. 1988, and enacted a new Section 139.031. Subsection 5 of Section 139.031 as enacted by House Bill No. 728 provides:

> 5. All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund

> any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector, or shall credit against the taxpayer's tax liability in the following taxable year any real or personal property tax mistakenly or erroneously levied against the taxpayer and collected in whole or in part by the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The governing body, or other appropriate body or official of the county or city not within a county, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise. [Emphasis added.]

The provisions added in 1989 by House Bill No. 728 have been highlighted above by underlining.

From the information you provided with your opinion request, we understand the first situation involves a house which is located on property adjoining the taxpayer's property but whose value was included in the assessed valuation of the taxpayer's property. The second situation involves a farm which consists of substantially fewer acres than what the assessor thought when the assessor valued the property.

Section 139.031.5 provides for a tax refund for taxes which have been mistakenly or erroneously paid or a tax credit for taxes which have been mistakenly or erroneously levied. If the overpaid taxes cannot be construed to be mistakenly or erroneously paid or levied, Section 139.031.5 is not applicable.

While there have been several cases in Missouri which have attempted to define what constitutes taxes which have been mistakenly or erroneously paid, there is no Missouri case law which defines the phrase "mistakenly or erroneously levied" as used in Section 139.031.5. In the most recent case which interpreted "mistakenly or erroneously paid" in Section 139.031.5 prior to the 1989 amendment, the Missouri Supreme Court held that a property owner was entitled to a refund of taxes "mistakenly or erroneously paid," where the assessor failed to provide the owner with notice of increased valuation, thus rendering the increase invalid. Crest Communications v. Kuehle, 754 S.W.2d 563 (Mo. banc 1988). This case provides

little guidance regarding the situations about which you are concerned.

Since there is no case law which has interpreted the meaning of "mistakenly or erroneously levied," the rules of statutory interpretation should be followed. "The primary rule of statutory construction is to ascertain the intent of the legislature from language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning." Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). The plain and ordinary meaning of the words which constitute the phrase "mistakenly or erroneously levied" can be derived from Black's Law Dictionary 487, 816, 903 (5th ed. 1979).

> Error. A mistaken judgment or incorrect belief as to the existence or effect of matters of fact . . . . (Emphasis added.)
>
> Levy, v. To assess; raise; execute; exact; tax; collect; gather; take up; seize. Thus, to levy (assess, exact, raise, or collect) a tax; . . . . (Emphasis added.)
>
> Mistake. Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. (Emphasis added.)

With the aid of these definitions, the issue posed can be further refined into the question, was the assessor's assessment of the property in question affected by his/her incorrect belief about the existence or effect of a fact? The answer to that question is yes. The assessor in both factual situations presented was incorrect in his or her belief of the facts; the fact of on whose property a house was located and the fact of how large a piece of property was. These incorrect beliefs of fact caused the assessment to be unduly large; therefore, the taxpayer's tax was "mistakenly or erroneously levied."

The Honorable Norman E. Sheldon

If taxes are mistakenly or erroneously levied, and then paid, the taxpayer may apply for a credit against his/her tax liability in the following taxable year. Therefore, in the situations about which you are concerned, the taxpayers are entitled to a credit against their tax liability in the following taxable year.

Very truly yours,

William L. Webster

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Attorney General

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December 5, 1989

OPINION LETTER NO. 175-89

The Honorable Joseph Ortwerth
Representative, District 18
State Capitol Building, Room 101-H
Jefferson City, Missouri 65101

Dear Representative Ortwerth:

This opinion letter is in response to your questions regarding the compensation of county officials. The questions you posed are as follows:

> 1. If a first-class noncharter salary commission met in 1988 and established compensation at 100% of the maximum permitted under the appropriate step found in Section 50.343 RSMo, and it meets in 1989 when the county's assessment value has risen to the next step, is the maximum allowable compensation the amount in the next step or may the commission increase compensation without regard to any maximum limitation?
>
> 2. Under Section 50.343 RSMo, should the compensation of first-class noncharter elected officials be reduced for not completing 20 hours of classroom instruction each calendar year?

We understand your questions relate to St. Charles County.

Section 50.343, RSMo Supp. 1988, provides:

> 50.343. Compensation of certain officers, how computed (St. Charles, Jefferson and Greene counties).--Other provisions of law to the contrary

notwithstanding, in any first class nonchartered county not containing any part of a city with a population of three hundred thousand or more, the annual salary of a county recorder of deeds, clerk, auditor, county commissioner, collector, treasurer or assessor shall be computed on an assessed valuation basis as set forth in the following schedule. The assessed valuation factor shall be the amount thereof as shown for the year next preceding the computation. The provisions of this section shall permit a reduction in the amount of compensation received by any person holding office as of May 13, 1988. Any person elected or appointed to the office of county recorder of deeds, clerk, auditor, county commissioner, collector, treasurer, or assessor in any first class nonchartered county not containing any part of a city with a population of three hundred thousand or more, after May 13, 1988, shall devote full time to the duties of the office.

(1) For a recorder of deeds, clerk, auditor, presiding commissioner, collector, treasurer, or assessor:

Assessed Valuation	Salary
875,000,001 to 950,000,000	$37,000
950,000,001 to 1,000,000,000	38,000
1,000,000,001 to 1,025,000,000	38,500
1,025,000,001 to 1,050,000,000	39,000
1,050,000,001 to 1,075,000,000	39,500
1,075,000,001 to 1,100,000,000	40,000
1,100,000,001 to 1,200,000,000	40,500
1,200,000,001 to 1,300,000,000	41,000
1,300,000,001 to 1,400,000,000	41,500
1,400,000,001 to 1,500,000,000	42,000
1,500,000,001 to 1,600,000,000	42,500
1,600,000,001 to 1,700,000,000	43,000
1,700,000,001 to 1,800,000,000	43,500
1,800,000,001 to 1,900,000,000	44,000
1,900,000,001 to 2,000,000,000	44,500
2,000,000,000 or more	45,000

(2) For an associate commissioner:

Assessed Valuation			Salary
875,000,001	to	950,000,000	$27,000
950,000,001	to	975,000,000	27,500
975,000,001	to	1,000,000,000	28,000
1,000,000,001	to	1,025,000,000	28,500
1,025,000,001	to	1,050,000,000	29,000
1,050,000,001	to	1,075,000,000	29,500
1,075,000,001	to	1,100,000,000	30,000
1,100,000,001	to	1,200,000,000	30,500
1,200,000,001	to	1,300,000,000	31,000
1,300,000,001	to	1,400,000,000	31,500
1,400,000,001	to	1,500,000,000	32,000
1,500,000,001	to	1,600,000,000	32,500
1,600,000,001	to	1,700,000,000	33,000
1,700,000,001	to	1,800,000,000	33,500
1,800,000,001	to	1,900,000,000	34,000
1,900,000,001	to	2,000,000,000	34,500
2,000,000,001	or more		35,000

(Emphasis added.)

Section 50.343 was enacted by Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session (1988) (hereinafter referred to as "Senate Bill No. 431"). Such section is limited in its application to "any first class nonchartered county not containing any part of a city with a population of three hundred thousand or more." Such restriction limits the section to St. Charles County, Jefferson County and Greene County.

In posing your first question in connection with the "maximum" amount granted to certain county officials, you bring to our attention an apparent conflict between Section 50.343 and Section 50.333, RSMo Supp. 1988. Section 50.333 provides in part that "[t]here shall be a salary commission in every nonchartered county." Section 50.333 goes on to set forth the composition of the county salary commission and the manner in which it proceeds to determine the compensation of county officials. Section 50.333 was first enacted in 1987 by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill Nos. 65, 133, 178, 216 and 231, 84th General Assembly, First Regular Session (1987). Section 50.333 was amended by Senate Bill No. 431 which also first enacted Section 50.343.

The initial issue to resolve is whether the compensation of the county officials specified in Section 50.343 in the counties to which such section applies shall be based on the schedules

contained in such section or whether the county salary commission can adjust such salaries. The plain meaning of the statutory language is to be given effect whenever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). When a statute is plain and unambiguous, there is no room for construction and it must be applied by the courts as it was written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444, 448 (Mo. banc 1964). Section 50.343 states that "[o]ther provisions of law to the contrary notwithstanding," the salaries of certain officials in the specified counties "shall be computed on an assessed valuation basis as set forth in the following schedule." The section continues with the schedules for the named officials. The section is clear and unambiguous and contains no exception for an adjustment by the county salary commission. Therefore, we conclude that the salaries of the officials listed in Section 50.343 in the specified counties shall be as provided in the schedules set forth in that section without any adjustments by the county salary commission.

With regard to your second question concerning a reduction in compensation for failure to complete classroom instruction each year, Section 50.343 does not contain any provision regarding a reduction in compensation for failure to complete classroom instruction. The salaries of the officials listed in that section in the specified counties shall be as provided in the schedules set forth in that section regardless of whether or not classroom instruction is completed each year.

In summary, it is the opinion of this office that the salaries of the officials listed in Section 50.343, RSMo Supp. 1988, in the counties to which such section applies shall be as provided in the schedules set forth in that section without any adjustments by the county salary commission and regardless of whether or not an official completed any classroom instruction that year.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

CITIES, TOWNS AND VILLAGES: Section 610.021(3), RSMo
SUNSHINE LAW: Supp. 1988, does not authorize the governing body of a city to close a meeting when considering appointments of volunteers to citizen boards.

November 28, 1989

OPINION NO. 184-89

The Honorable Jean H. Mathews
Representative, District 73
2620 N. Waterford Drive
Florissant, Missouri 63033

Dear Representative Mathews:

This opinion is in response to your question asking:

> Regarding the application of 610.021 RSMo (1987) to city governing bodies, can a city council close a meeting when considering appointments of volunteers to citizen boards by claiming that such an appointment deals with employee personnel matters under 610.021?

Section 610.021, RSMo Supp. 1988, provides in pertinent part:

> 610.021. Closed meetings and records authorized, when--exceptions, parents and guardians to certain scholastic records and public access to certain personnel records.--Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:
>
> * * *
>
> (3) Hiring, firing, disciplining or promoting an employee of a public governmental body. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body must be made available to the public within seventy-two hours of the

> close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice before such decision is made available to the public; [Emphasis added.]

This language was incorporated in Chapter 610 in 1987 as part of the extensive amendment by House Committee Substitute for Senate Substitute for Senate Bill No. 2, 84th General Assembly, First Regular Session. Prior to this amendment an exception allowing a meeting to be closed was recognized for "meetings relating to the hiring, firing, disciplining, or promotion of personnel of a public governmental body." [Emphasis added.] Section 610.025.3, RSMo 1986 (repealed).

In determining the legislature's intent behind this change in statutory language, we must look to the well-established rule of statutory construction that words appearing in a statute must be given their "plain and ordinary meaning." State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974). In interpreting the earlier language, this office observed in Attorney General Opinion No. 155, Marshall, 1975, a copy of which is enclosed, that "the 'plain and ordinary meaning' of the word 'personnel' is rather broad." The opinion concluded "that the word 'personnel' as used in the context of § 610.025(4) [RSMo Supp. 1973] refers to officers or employees of a public governmental body who are hired or appointed by, and who are subject to removal by, such governmental body."

However, subsequent interpretations, in addition to the statutory amendment, have narrowed the scope of this exception. In Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. App. 1980), the Missouri Court of Appeals found a violation of Chapter 610 when a city council meeting was closed to discuss the mayor's salary. The court made a distinction between "general employees" and the mayor, "who was the elected presiding executive officer of the city." Id., 604 S.W.2d at 723. Finally, in Attorney General Opinion No. 48-88, a copy of which is enclosed, this office, in interpreting the language of Section 610.021, concluded that independent contractors are not within the meaning of the word "employee" as found in Section 610.021(3).

The 1987 amendment added a statement of public policy to serve as guidance in interpreting the provisions of Chapter 610:

> 610.011. Liberal construction of law to be public policy.--1. It is the public policy of this state that meetings,

> records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy.
>
> 2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all public votes of public governmental bodies shall be recorded as set forth in section 610.015.

Section 610.011, RSMo Supp. 1988.

The 1987 amendment, by expressly stating the public policy of openness and changing the word "personnel" to "employee," has narrowed the scope of the exception allowing a meeting, record or vote to be closed to the extent it relates to "hiring, firing, disciplining or promoting." A volunteer to a citizen board is not an employee of the public governmental body. Section 610.021(3), does not authorize a public governmental body to close a meeting when considering appointments of volunteers to citizen boards, because such an appointment is not within the specific exception for "hiring, firing, disciplining or promoting an employee of a public governmental body."

CONCLUSION

It is the opinion of this office that Section 610.021(3), RSMo Supp. 1988, does not authorize the governing body of a city to close a meeting when considering appointments of volunteers to citizen boards.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures: Opinion No. 155, Marshall, 1975
Opinion No. 48-88

ATTORNEY GENERAL OF MISSOURI

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December 21, 1989

OPINION LETTER NO. 186-89

The Honorable Joe McCracken
Representative, District 139
State Capitol Building, Room 114
Jefferson City, Missouri 65101

Dear Representative McCracken:

This opinion letter is in response to your question asking:

> Is an elected director of a Fire Protection District, as defined in Section 321.010, RSMo 1986 and contained wholly in a first class county, in violation of Section 321.015, RSMo 1986 if the director is an employee of a municipality or state department, even if the individual was an employee of the municipality or state department before being elected to the board of the Fire Protection District, and the election was by a majority of the qualified voters with public knowledge of the individual's employment before the election?

The information you included with your opinion request indicates you are concerned about two possible situations. One situation involves a director of a fire protection district who is employed by the Missouri State Highway and Transportation Department. The second situation involves a director who is employed by a city. Each was so employed prior to being elected director of the fire protection district. The fire protection district about which you are concerned is located in a first class county.

Section 321.015, RSMo 1986, provides:

> 321.015. District director not to hold other office or employment--office to be vacated, when--exceptions.--No person

> holding any lucrative office or employment under this state, or any political subdivision thereof as defined in section 70.120, RSMo, shall hold the office of fire protection district director under this chapter. When any fire protection district director accepts any office or employment under this state or any political subdivision thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary or expenses as fire protection district director. This section shall not apply to members of the organized militia, of the reserve corps, public school employees and notaries public, or to fire protection districts located wholly within counties of the second, third or fourth class. The term "lucrative office or employment" does not include receiving retirement benefits for service rendered to a fire protection district, the state or any political subdivision thereof.

We assume that both individuals receive monetary compensation in their respective employment, thereby holding "lucrative office or employment" within the terms of the statute. The director who is employed by the Missouri State Highway and Transportation Department is employed by the state. The director who is employed by a city is employed by a "political subdivision" as that term is defined in Section 70.120, RSMo 1986. See State ex inf. Gavin v. Gill, 688 S.W.2d 370 (Mo. banc 1985). Therefore, Section 321.015 prohibits each from holding the office of fire protection district director.

You also state that each was elected by a majority of qualified voters and that these voters had full knowledge of the nature of the candidate's employment at the time of the election. We find no authority for the proposition that public knowledge of a candidate's employment, or the election itself, in any way creates an exception to the provisions of Section 321.015.

The Honorable Joe McCracken

It is the opinion of this office that Section 321.015, RSMo 1986, prohibits each of the directors about which you are concerned from holding the office of fire protection district director.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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December 28, 1989

OPINION LETTER NO. 199-89

Dr. Robert E. Bartman
Commissioner of Education
Department of Elementary and Secondary Education
P.O. Box 480
Jefferson City, MO 65102

Dear Dr. Bartman:

This opinion letter is in response to your question asking:

> Under House Bill 610, may an individual employed by the Department of Elementary and Secondary Education who is currently a member of the Public School Retirement System switch from the Public School Retirement System to the Missouri State Employees' Retirement System on January 1, 1990, as provided for in the bill, collect the refund provided for in the bill, and if the individual has thirty years creditable service begin drawing retirement payments from the Public School Retirement System even though the person remains in the employ of the Department of Elementary and Secondary Education?

Senate Substitute for House Bill No. 610, 85th General Assembly, First Regular Session (1989) (hereinafter referred to as "House Bill No. 610") was signed into law by the Governor, and with an emergency clause, became effective on June 14, 1989. Among other matters, this legislation repealed Section 104.342, RSMo Supp. 1988, relating to certain retirement systems, and enacted in lieu thereof a new section relating to the same subject.

The Public School Retirement System of Missouri (hereinafter referred to as "PSRS") is provided for by Sections 169.010, et seq. RSMo. The Missouri State Employees' Retirement System (hereinafter referred to as "MOSERS") is provided for in Chapter 104, RSMo. The PSRS retirement system is an actuarial reserve, joint-contributory program, to which members and employers make matching contributions. The MOSERS retirement program is a state funded retirement program. Under the provisions of Chapter 169, RSMo, certain employees of the Department of Elementary and Secondary Education (hereinafter referred to as "DESE") participate in the PSRS retirement system. In this regard, membership in the PSRS retirement system under the provisions of Section 169.050.4, RSMo Supp. 1989, is terminated by failure of a member to be an employee under the system for more than four of any five consecutive years, by death, withdrawal of contributions, or retirement.

Section 104.342.4, RSMo Supp. 1989, as enacted by House Bill No. 610, provides:

> 4. Effective January 1, 1990, only after an affirmative referendum in accordance with section 105.353, RSMo, any person who is employed on a full-time basis by the department of elementary and secondary education, shall be a member of the system; except that any person duly certified under the law governing the certification of teachers who is a full-time employee at any time during the period extending from June 14, 1989, through December 31, 1989, and is contributing because of such employment to the retirement system established under sections 169.010 to 169.140, RSMo, may elect to continue in that retirement system if such election is made on or before December 31, 1989. This election shall not apply to any such person who commenced receiving retirement benefits prior to January 1, 1990, from any state retirement system because of such service. (Emphasis added.)

Section 104.342.5, RSMo Supp. 1989, as enacted by House Bill No. 610, provides:

> 5. On June 14, 1989, all newly employed persons in the positions described

> in subsection 3 of this section shall become members of the Missouri state employees' retirement system. Effective January 1, 1990, and only after an affirmative referendum provided for in subsection 4 of this section, all newly employed persons in the positions described in subsection 4 of this section shall become members of the Missouri state employees' retirement system.

Section 104.342.7, RSMo Supp. 1989, as enacted by House Bill No. 610, provides:

> 7. Any person entitled to make the election provided by subsection 3 or 4 of this section, who does not make such election, in writing, on or before December 31, 1989, shall be deemed to have elected to be governed by subdivision (1) of this subsection.
>
> (1) Those persons described in subsections 3 and 4 of this section who elect or have elected by written request filed with the board to be members of this system, shall be entitled to creditable prior service for service rendered in any of the positions described in subsections 1, 3 and 4 of this section. Any person who so elects shall be eligible, upon written request filed with the board on or before March 31, 1990, with the retirement system established under sections 169.010 to 169.140, RSMo, or sections 169.410 to 169.540, RSMo, to receive a refund of his accumulated contributions for the creditable service in any of the positions described in subsections 1, 3 and 4 of this section, plus interest at an annual rate of six percent computed on the refundable balance, if any, in his account in that retirement system as of June 30, 1989. Such refunds shall be made prior to June 1, 1990. If any creditable prior service transferred under subsection 1, 3 or 4 of this section, or subsection 3 of section 104.372, includes periods of service not covered by the federal Social Security Act,

as provided in sections 105.300 to 105.445, RSMo, then, in calculating the benefit amount payable under section 104.374, to such member, the annuity shall include the normal annuity payable under section 104.374, or an amount equal to two and one-tenth percent of the average compensation of the member for such service, whichever is greater, multiplied by the number of years of such creditable service for the positions described in subsections 1, 3 and 4 of this section not covered by the federal Social Security Act;

(2) Any person described in subsections 3 and 4 of this section, who elects to remain in one of the retirement systems established under sections 169.010 to 169.140, RSMo, or sections 169.410 to 169.540, RSMo, shall, notwithstanding any provision of chapter 169, RSMo, to the contrary, be a noncontributing member of such system and shall receive a refund of his accumulated contributions for the creditable service in any of the positions described in subsection 1, 3 or 4 of this section, plus interest at an annual rate of six percent computed on the refundable balance, if any, in his account in that retirement system as of June 30, 1989. Such refunds shall be made prior to June 1, 1990. At the time of retirement under the provisions of sections 169.010 to 169.140, RSMo, or sections 169.410 to 169.540, RSMo, such person shall receive a retirement benefit computed under the then existing law of that retirement system; except that, for any person employed in a position described in subsection 4 of this section, the benefit shall be the amount computed as though the position were not covered by the federal Social Security Act, reduced by the amount of any federal social security benefit the person may receive which is attributable to service rendered in the positions described in subsection 4 of this section after December 31, 1989.

Section 104.342.8, RSMo Supp. 1989, as enacted by House Bill No. 610, provides in part:

> 8. Upon payment of the refunds provided in subdivision (1) of subsection 7 of this section, each refunding retirement system shall pay to the state employees' retirement system, by December 31, 1990, an amount actuarially determined to equal the liability transferred from such retirement systems. . . .

It is our understanding that the thrust of your opinion request is to inquire as to whether or not an individual currently employed by DESE and who is currently a member of the PSRS retirement system, may elect to retire from the PSRS retirement system and receive a full retirement benefit from the PSRS retirement system, receive a refund of accumulated contributions and interest from the PSRS retirement system for his or her state service, continue to be employed by DESE and receive his or her full salary, and become a new member of the MOSERS retirement system and accumulate membership service credit in that retirement system.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. Wolff Shoe Company v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). The provisions of an entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized. Community Federal Savings & Loan Association v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988), cert. denied 109 S.Ct. 231, 102 L.Ed.2d 221 (1988).

Section 104.342.4 requires a favorable referendum for Social Security coverage by employees of DESE who are members of the PSRS retirement system. We have been informed a favorable Social Security referendum was held by the employees of DESE on November 1, 1989.

We fail to find any statutory authority supporting an individual currently employed by DESE and who is currently a member of the PSRS retirement system receiving a full retirement benefit from the PSRS retirement system, receiving a refund of accumulated contributions and interest from the PSRS retirement system for his or her state service, and continuing to be employed by DESE and receiving his or her full salary. The last sentence in Section 104.342.4 specifically provides that the

election authorized by that subsection does not apply to any person who commenced receiving retirement benefits prior to January 1, 1990, from any state retirement system because of such service. Because of this provision in Section 104.342.4, an employee of DESE in a situation such as that about which you inquire, cannot commence receiving retirement benefits prior to January 1, 1990, from the PSRS retirement system and receive the benefits authorized in Section 104.342.7.

Section 104.342.4 provides that "[e]ffective January 1, 1990," such person is a member of the MOSERS retirement system unless an election to continue in the PSRS retirement system is made on or before December 31, 1989. Effective January 1, 1990, the individuals about which you are concerned are governed by either subsection 1 of Section 104.342.7 or subsection 2 of Section 104.342.7.

Those governed by subsection 2 cannot receive all of the benefits posed in your question since they have chosen to remain a member of the PSRS retirement system. While subsection 2 authorizes them to receive a refund of accumulated contributions and interest from the PSRS retirement system for their state service, they remain a noncontributing member of said system. Section 169.560, RSMo 1986, provides:

> Any person retired and currently receiving a retirement allowance under sections 169.010 to 169.140, other than for disability, may be employed in any capacity in a district included in the retirement system created by those sections on either a part-time or temporary-substitute basis not to exceed a total of three hundred sixty hours in any one school year, without a discontinuance of his retirement allowance. Such a person shall not contribute to the retirement system because of earnings during such period of employment. If such a person is employed in any capacity by such a district on a regular, full-time basis, he shall not be eligible to receive his retirement allowance for any month during which he is so employed and shall contribute to the retirement system. (Emphasis added.)

Section 169.010(4), RSMo Supp. 1989, defines the term "district" as follows:

> (4) "District" shall mean public school, as herein defined;

"Public school" is defined in Section 169.010(12) as follows:

> (12) "Public school" shall mean . . . and also the state of Missouri and each county thereof, to the extent that the state and the several counties are employers of teachers as herein designated;

In addition, the term "teacher" is defined in Section 169.010(16), as follows:

> (16) "Teacher" shall mean any person who shall be employed by any public school, on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; any person employed in the state department of elementary and secondary education or by the state board of education on a full-time basis who shall be duly certificated under the law governing the certification of teachers and who did not become a member of the Missouri state employees' retirement system under section 104.342, RSMo; and persons employed by the board of trustees of the public school retirement system of Missouri on a full-time basis who shall be duly certified under the law governing the certification of teachers. The term "teacher" shall be synonymous with the term "employee" as defined in this section.

Under the foregoing statutory provisions, the Department of Elementary and Secondary Education of the State of Missouri is considered a public school or school district in the PSRS retirement system to the extent that it employs teachers. The provisions of Section 169.560 would apply to those employees who serve with DESE as teachers so that if any such individuals are employed by DESE on a regular, full-time basis, these individuals shall not be eligible to receive their retirement allowance for any month during which they are so employed. Therefore, an employee of DESE in a situation such as that about which you inquire who elects to be governed by subsection 2 cannot continue to be employed by DESE and also receive a full retirement benefit from the PSRS retirement system.

Likewise, those governed by subsection 1 of Section 104.342.7 cannot receive all of the benefits posed in your question. Pursuant to Section 104.342.4, such persons, effective January 1, 1990, are members of the MOSERS retirement system. Effective January 1, 1990, their creditable prior service as employees of DESE is transferred to the MOSERS retirement system. Therefore, effective January 1, 1990, they are not entitled to receive retirement benefits from the PSRS retirement system for such service.

In conclusion, we find no statutory mechanism by which an individual currently employed by DESE and who is currently a member of the PSRS retirement system, may elect to retire from the PSRS retirement system and receive a full retirement benefit from the PSRS retirement system, receive a refund of accumulated contributions and interest from the PSRS retirement system for his or her state service, continue to be employed by DESE and receive his or her full salary, and become a new member of the MOSERS retirement system and accumulate membership service credit in that retirement system.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General